DIAC

Delhi International Arbitration Centre

JOURNAL OF ARBITRATION

2021

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DELHI INTERNATIONAL
ARBITRATION CENTRE
(DIAC)

Contents

CHARTER

Whereas right to fair, speedy and inexpensive justice is inherent in every litigant; and

Whereas Section 89 of the Code of Civil Procedure as inserted by amendment Act of 1999 requires the Court to facilitate and encourage litigating parties to take recourse to ADR mechanisms and mandates the Court, where it finds existence of elements of settlement, to formulate the terms of settlement and to refer the parties to any of the four alternative modes of settlement out of court including arbitration; and

Whereas the object of the said newly inserted provision was obviously to promote alternative methods of dispute resolution, absence of detailed modalities therein, recourse to such ADR mechanisms remained somewhat dormant.

Whereas the Hon'ble Supreme Court in its decision in *Salem Advocate Bar Association, Tamil Nadu v. UOI (2006) 6 SCC 344* having adopted the reports of the Committee constituted by it to ensure that the amendments become effective and result in quicker dispensation of justice and has desired that all concerned should take follow up action; and

Whereas the said Committee inter alia suggested preparation and maintenance of manuals for alternative methods for resolution of disputes and panel of arbitrators, mediators, conciliators; and

Whereas it is considered highly desirable that in order to give full effect to the said objectives and with a view to secure fair, speedy and inexpensive justice to the litigants by adopting recourse to one of the methods of ADR mechanism i.e. arbitration; and

Whereas Section 11 of the Arbitration and Conciliation Act, 1996, contemplates appointment of arbitrators by the Chief Justice or any person or institution designated by him in the circumstances specified therein; and

Whereas institutional arbitration is perceived as the most effective mechanism to achieve the aforesaid objective;

NOW THEREFORE, it is proposed to set up an Arbitration Centre within the High Court premises, which would otherwise function as an independent and autonomous institution and would facilitate in achieving the said objectives.

The Arbitration Centre shall ensure that the arbitration proceedings are inexpensive and are concluded within a reasonable time frame limiting the sittings of the Arbitral Tribunal to specified stages, such as, settlement of terms of reference, recording oral evidence and hearing oral arguments.

DIAC

Delhi International Arbitration Centre

Rationale

Amalgamating the *'modern nib'*
as the proverbial judicial last word
coupled with the
ancient & traditional writing tool
'feather' as its stylus:
the DIAC comes alive as
the arbitration centre
through the ages… for the ages.

JUSTICE DHIRUBHAI NARANBHAI PATEL

Chief Justice

High Court of Delhi

MESSAGE FROM THE PATRON IN CHIEF

Delhi International Arbitration Centre (DIAC), in its journey of over a decade has established itself as an eminent Arbitral Institution in the Indian Arbitration regime. With the privilege of being the first ever High Court annexed Arbitration Centre, DIAC had a humble beginning with only three referrals in the year 2009 which is now scaled upto more than 2800. DIAC has also embarked its presence with over 1600 number of cases being decided under its aegis.

Functioning as an independent and autonomous institution, DIAC ensures that proceedings are conducted in the most inexpensive and time bound manner. In order to achieve the said objective, DIAC has framed its own set of rules i.e. DIAC (Arbitration Proceedings) Rules, 2018; DIAC (Internal Management) Rules, 2012 and DIAC (Administrative Costs and Arbitrators' Fees) Rules, 2018 which are amended and updated from time to time.

Situated in the Delhi High Court itself, DIAC is a convenient venue for the disputants, lawyers and the Arbitrators. With state of the art infrastructure, DIAC offers nine hearings rooms equipped with all modern facilities and secretarial support. However, in order to match up with the surging work load, DIAC will be soon shifting its activities to more sizable premises.

DIAC has distinguished panel of 454 Arbitrators that comprise of former Chief Justices of India, former Supreme Court Judges, former High Court Chief Justices and Judges, International Arbitrators, former District and Session Judges, Senior Advocates, Advocates, Engineers, Architects, Chartered Accountants, former Bureaucrats and other experts from various fields.

The publication of the first issue of this Journal is an endeavor of DIAC to provide its readers with the well researched articles authored by prominent personalities in the realm of Arbitration.

As the Patron in Chief of this esteemed institution, I extend my best wishes and support to the Editorial Committee of DIAC for coming up with this Journal.

(Justice Dhirubhai Naranbhai Patel)

JUSTICE J.R. MIDHA
Judge
High Court of Delhi

MESSAGE FROM THE CHAIRPERSON

Delhi International Arbitration Centre (DIAC) established by the Delhi High Court in the year 2009, is the first ever High Court annexed Arbitration Institution in the country. DIAC was set up to institutionalize and to bring transparency and reliability in the arbitration process. Over a period of more than a decade, DIAC has proved its path-breaking potential.

The functioning of DIAC is overseen by the Arbitration Committee of Delhi High Court which comprises of the Judges of Delhi High Court, Additional Solicitor General, President of High Court Bar Association, Senior Advocates and Advocates. The Hon'ble Chief Justice of Delhi High Court is the Patron-in-Chief of DIAC.

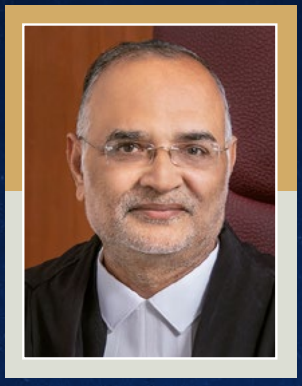
DIAC is located in the Delhi High Court premises and offers a centrally located convenient venue for the arbitrators, lawyers and the litigants. Presently DIAC has nine fully equipped hearing rooms with state of art facilities. In the upcoming 'S-Block' of Delhi High Court, two floors have been exclusively allocated to DIAC.

DIAC is committed to conduct the arbitration proceedings expeditiously in a cost effective manner. The panel of arbitrators of DIAC includes former Chief Justices of India, former Supreme Court Judges, former Chief Justices of various High Courts, former Judges of High Courts, former District and Sessions Judges, International Arbitrators, Senior Advocates/ Advocates, Engineers, Architects, Chartered Accountants, former bureaucrats and experts from different fields.

The publication of the first issue of our Journal is yet another milestone achieved by the Centre. The articles published in this Journal are far-reaching and comprehensive. The articles are authored by the personalities pioneer in the field of arbitration including sitting and retired Judges of the Supreme Court, Judges of High Courts, Senior Advocates/ Advocates and International Arbitrators.

I gratefully acknowledge the contribution and research of the reputed authors. I also appreciate the hard work done by the Editorial Committee of DIAC in curating the first ever issue of the DIAC Journal.

(Justice J.R. Midha)



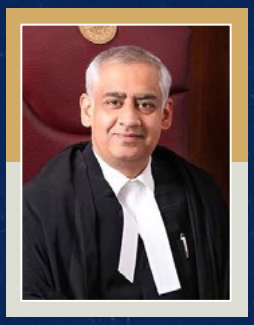
Hon'ble Mr. Justice Dhirubhai Naranbhai Patel
The Chief Justice, High Court of Delhi is the Patron-in-Chief of Delhi International Arbitration Centre.

MEMBERS OF THE ARBITRATION COMMITTEE

Hon'ble Mr. Justice J.R. Midha
Chairperson

Hon'ble Mr. Justice Jayant Nath
Vice Chairperson

Hon'ble Mr. Justice V. Kameswar Rao
Member



Hon'ble Mr. Justice Navin Chawla
Member

Hon'ble Ms. Justice Rekha Palli
Member

Mr. Chetan Sharma
Advocate, ASG, Delhi High Court, Member (Ex-Officio)

Mr. Mohit Mathur
Sr. Advocate, President, Delhi High Court Bar Association, Member (Ex-Officio)

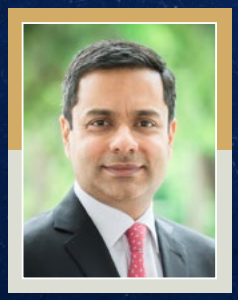
Mr. A.K. Ganguli
Sr. Advocate, Member

Mr. Rajiv Nayar
Sr. Advocate, Member

Mr. Ciccu Mukhopadhaya
Sr. Advocate, Member

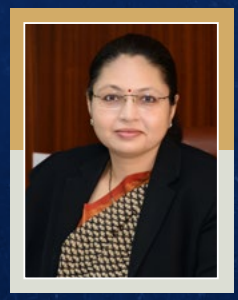
Mr. Rajeeve Mehra
Sr. Advocate, Member

Ms. Maninder Acharya,
Sr. Advocate, Member



Mr. Nakul Dewan
Sr. Advocate, Member

Mr. Shashank Garg
Advocate, Member



Ms. Kaveri Baweja
Coordinator, Member (Ex-Officio)

DIAC SECRETARIAT

Ms. Kaveri Baweja (DHJS)
Coordinator

Mr. Pranjal Aneja (DJS)
Addl. Coordinator

Ms. T. Priyadarshini (DJS)
Addl. Coordinator

Mr. Nishant Garg (DJS)
Addl. Coordinator


Delhi International Arbitration Centre
2nd & 3rd Floor

Sitting Left to Right: Justice Hima Kohli, Justice D.N. Patel (Chief Justice, High Court of Delhi) and Justice J.R. Midha
Standing Left to Right: Mr. Pranjal Aneja (Addl. Coordinator), Ms. Kaveri Baweja (Coordinator), Ms. T. Priyadarshini (Addl. Coordinator) and Mr. Nishant Garg (Addl. Coordinator)


Inauguration of
DELHI HIGH COURT ARBITRATION CENTRE
by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ARBITRATION CE


Inauguration of
DELHI HIGH COURT ARBITRATION CENTRE
by
Hon'ble Shri Justice K.G. Balakrishnan
Chief Justice of India
Wednesday, the 25th November, 2009


DELHI HIGH COURT
ARBITRATION CENTRE

HISTORY & ORIGIN

The Indian arbitration culture has been for long dominated by ad-hoc arbitrations. This has led to certain peculiar features, and spawned concerns regarding the time consumed, the cost and expense involved and at times, even the efficacy of the arbitral process. The community of arbitration practitioners, users and courts hoped that with the advent of the Arbitration and Conciliation Act, 1996, several concerns, particularly those arising from the multiple layers of challenges based on the pre-existing law, would end, resulting in speeding up of arbitrations. This sadly remained only a hope; new concerns and challenges emerged, regarding interpretation of the law. In the meanwhile, delays continued to undermine arbitration as a means of swift and inexpensive alternative dispute resolution mechanism.

With a view to bring about transparency and reliability to arbitration mechanism in India and to quicken its process, the High Court of Delhi came up with the idea of establishing an Institutional Arbitration Centre under its aegis and within its premises. The ball for the establishment of Delhi High Court Arbitration Centre (as it was originally called) was set rolling by former Chief Justice of the Delhi High Court, Justice Ajit Prakash Shah, by convening a meeting for exchange of ideas so that a credible, transparent and reliable mechanism for resolution of cases through arbitration could be created and offered to the consumers of justice. The first meeting took place in the chamber of the Hon'ble Chief Justice on 4th February, 2009 in which some sitting Judges of the High Court, Retired Judges and Union Law Officers and Senior Advocates participated. On the basis of those deliberations, a general consensus emerged that an Arbitration Centre should be set up in Delhi under the supervision of the Delhi High Court.

With a view to chalk out the modalities in regard to the Constitution, structure, functioning, staffing etc. of the Centre, a Sub Committee was appointed by Hon'ble the Chief Justice, tasking to examine issues in detail and prepare a draft Scheme/Rules. The Sub-committee was formally constituted by Chief Justice Shah on 6th February, 2009 under the Chairmanship of Hon'ble Mr. Justice RC Lahoti, Former Chief Justice of India. The Sub-committee held its first meeting on 25.02.2009 and thereafter formally met six times. It was decided to set up the Centre in the Delhi High Court under the control and guidance of a Committee of Judges and representatives of the Bar. The model of the Singapore International Arbitration Centre was kept in mind while establishing its framework. On the basis of the active discussion that followed, and the inputs that were received from various quarters, a definite scheme emerged which in due course took the Shape of a Charter and detailed set of Rules. Simultaneous to the exercise of preparing the Charter for DIAC, the process of finding an appropriate place for it to function from was also undertaken. The present location was decided upon as it is in close proximity of the Courts and would, therefore be convenient to the Advocates. With the requite financial support readily offered and made available by thew Government of NCT of Delhi, the Centre emerged with the State-of-the-Art facilities in record time.

The Centre was inaugurated as 'Delhi High Court Arbitration Centre' under the guidance of Mr. A.P. Shah, the then Chief Justice of Delhi High Court, on 25th November, 2009 by Mr. K.G. Balakrishnan, the then Chief Justice of India in the august presence of Dr. M. Veerappa Moily, the then Union Minister for Law and Justice, Smt. Sheila Dikshit, the then Chief Minister of NCT of Delhi and Mr. Justice A.P. Shah and his Companion Judges of High Court of Delhi and Mr. Goolam E. Vahanvati, the then Attorney General of India.

Institutional Arbitration at DIAC

Advantages of Institutional arbitration as opposed to *ad hoc* arbitrations are well known. With a view to assist and aid smooth functioning of arbitrations at DIAC, the Centre has several distinct features which not only help in cutting cost of arbitrations but also lent transparency and certainty of procedure while providing the necessary infrastructure, structured rules and extensive panel of experienced arbitrators.

Amongst other the few distinct features of Institutional arbitrations at DIAC are summed up as under:

Emergency Arbitration

The DIAC (Arbitration Proceedings) Rules, 2018 incorporated the provision for Emergency Arbitration to cater the needs of the disputant in a situation of exigency.

As per the procedure, a party in a requirement of urgent interim or conservatory measure that cannot await the formation of the Arbitral Tribunal, may make an application to the Coordinator, DIAC for appointment of an Emergency Arbitrator. The Emergency Arbitrator is appointed by DIAC within two day of making such request. The Emergency Arbitrator is required to ensure that the order is made within 7 days from the date of his appointment. The Emergency Arbitrator becomes *functus officio* after the order is made and does not forms part of the Arbitral Tribunal. The order of the Emergency Arbitrator remains operative for two months from the date of passing unless modified, substituted or vacated by the Arbitral Tribunal.

First ever High Court Annexed Institutional Arbitration Centre

DIAC has the distinction of being the first ever High Court annexed Institutional Arbitration Centre in India. It was conceitved to be an independent, transparent and professional institution that encourages and supports the growing demand for Institutional Arbitration in India. The Centre functions as an independent and autonomous institution that ensures that the arbitration proceedings are inexpensive and are concluded within a reasonable time frame. The Charter determines the core values of DIAC

Centrally located Venue

Located in the Delhi High Court premises itself, DIAC offers a centrally located and convenient venue for the Arbitrators, Lawyers and the parties.

State of the art infrastructure

Functioning of DIAC begin with only four hearing rooms on the Second floor of the Medical Unit Building. However, with the steadily increasing workload DIAC expanded its operations to the third floor of the same building in the year 2018. Presently, DIAC operates from 2nd and 3rd Floor of Medical Unit Building and has 9 fully equipped hearing rooms with varying seating capacities of upto fifteen to twenty persons at a time. All the hearing rooms have dedicated stenographers and supporting staff with projector facility, ensuring smooth functioning of the Centre.

DIAC is soon going to shift its operations to a more sizable premises. The upcoming Arbitration Centre is proposed to be located in a new block of Delhi High Court Campus.

Facility of Video Conferencing (VC)

DIAC offers the facility for conducting hearing through video conferencing using the CISCO Webex application. Unlike other arbitral institution, this facility is provided by DIAC without any extra charges. For seamless conduct of hearings, VC's are facilitated by Deputy Counsels appointed by DIAC. Facility of trained stenographers in the VC hearings is also provided by DIAC.

DIAC Rules

The proceedings and fees under the aegis of DIAC are governed by its own set of pre-established rules and procedure. To keep up with the consistent growth DIAC rules are updated from time to time. The presence of rules creates uniformity, certainty and more stability in the arbitration process. DIAC has 3 set of rules which includes:

- Delhi International Arbitration Centre (Arbitration Proceedings) Rules. 2018
- Delhi International Arbitration Centre (Internal Management) Rules, 2012
- Delhi International Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules, 2018

Cost effective& transparent fee structure

DIAC Administrative Costs and Arbitrators' Fees Rules provide for an inexpensive Administrative and Arbitrators fee structure. The Administrative charges of the Centre have been consciously kept low with an objective that the benefits and usage of arbitration to the parties in conflict, can be maximized.

Distinguished Arbitration Committee

The functioning of the Centre is looked after by the Arbitration Committee of Delhi High Court which Comprises of Judges of the Delhi High Court, Senior Advocates and Advocates. The Hon'ble Chief Justice, High Court of Delhi is the Patron-in-Chief of DIAC. The Committee looks after all policy matters including rules and procedures followed by the Centre. The Chairperson of the Committee looks after the affairs of the Centre on regular basis and oversees the functioning and general administration of the Centre including maintaining quality of Arbitrations by scrutinizing the empanelment of Arbitrators.

DIAC Secretariat

At the ground level, the day-to-day functioning of the Centre is managed by the Coordinator and Additional Coordinators who are responsible for managing the Centre's activities, as per rules, and the mandate of the Arbitration Committee. In order to ensure prudential management of Centre's activities, the rules introduced in 2012 provided for appointment of officials of Delhi Higher Judicial Services and Delhi Judicial Services as the Coordinator and Additional Coordinator at DIAC. The Centre also appoints Deputy Counsels, who are advocates, to facilitate the proper conduct of arbitration proceedings.

Extensive Panel of Arbitrators

DIAC maintains a panel of experienced Arbitrators comprising eminent legal luminaries including Former Chief Justices of India, Former Supreme Court Judges, Former High Court Chief Justices and Judges, International Arbitrators, Former District and Session Judges, Senior Advocates, Advocates, Engineers, Architects, Chartered Accounts, Former Bureaucrats and experts from different fields.

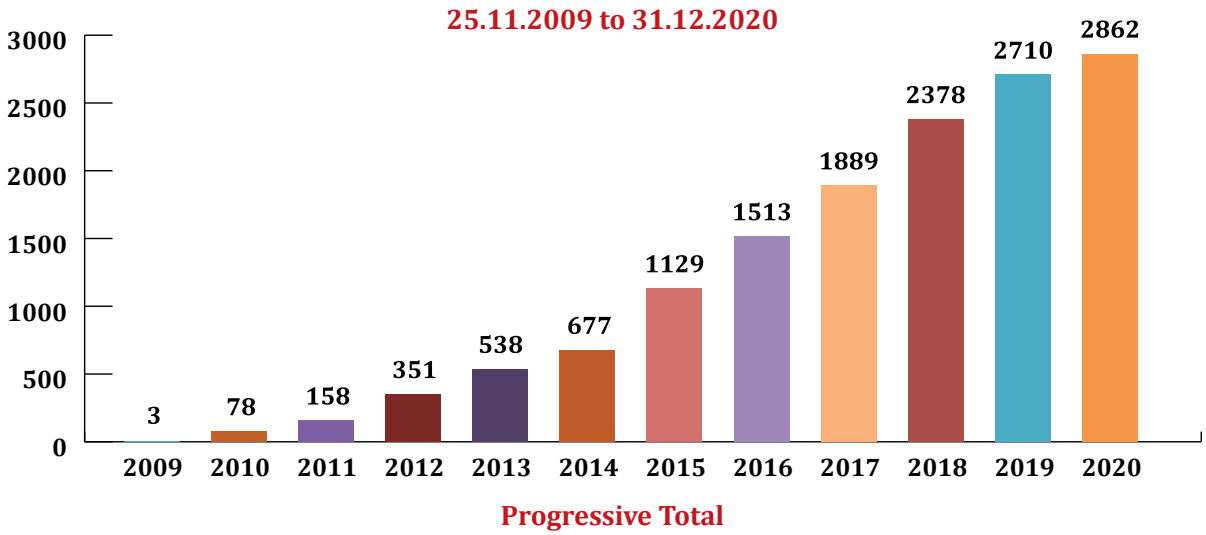
DIAC STATISTICS

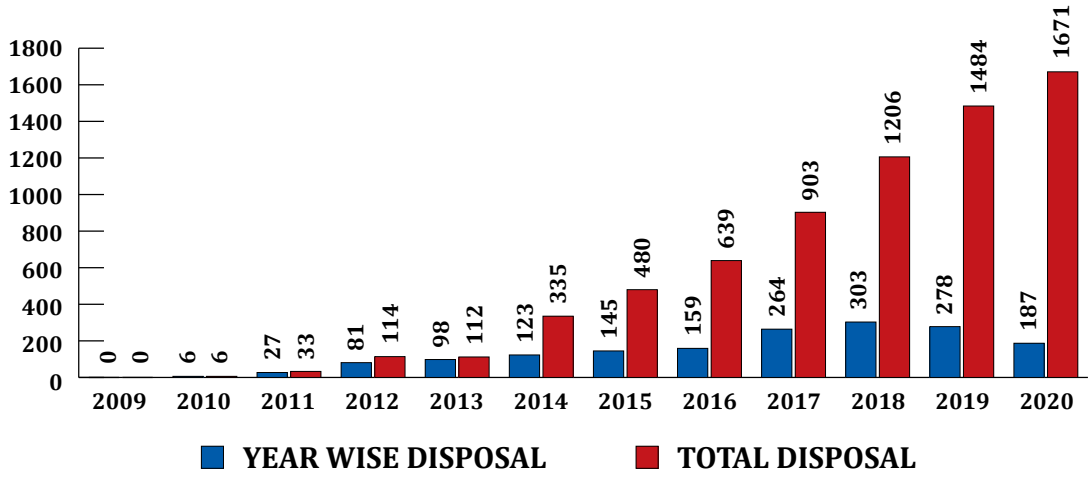
DIAC has witnessed exponential growth during its journey of over a decade now. The encouraging statistics nail the robust position of DIAC. The graphical representations below demonstrate its success and future potentiality.

DIAC had a humble beginning with only 3 cases referred to it in the year 2009, which scaled upto 2862 by the end of 2020. Total 1671 matters have been disposed off under its aegis by the end of 2020.

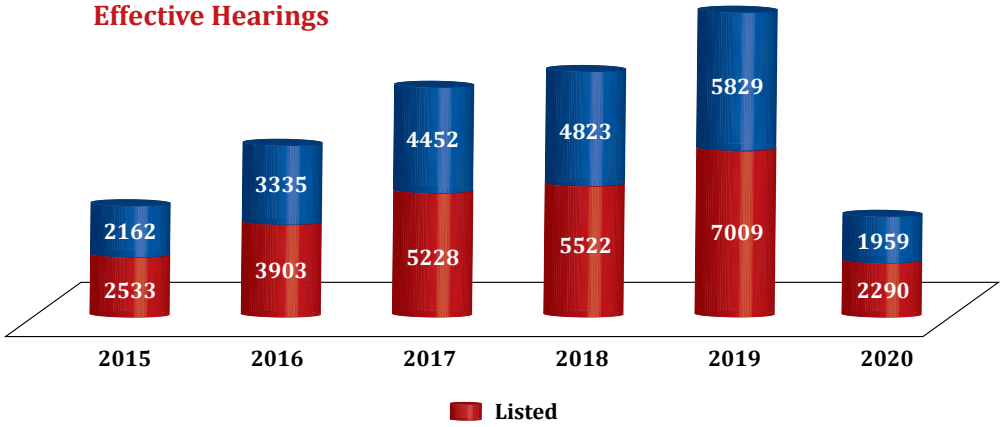
DELHI INTERNATIONAL ARBITRATION CENTRE (DIAC)
Number of Class from Inception i.e. 25.11.2009 till 31.12.2020

Month	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
January		17	3	12	6	8	58	17	62	26	28	30
February		14	9	12	13	10	117	33	34	31	22	29
March		2	14	9	24	5	74	22	39	60	11	14
April		6	11	17	14	8	44	15	43	43	17	0
May		4	10	29	10	6	26	24	54	59	37	0
June		1	0	0	0	0	2	3	0	20	14	30
July		2	10	15	27	15	6	8	7	55	21	8
August		10	5	22	21	44	22	31	21	52	11	10
September		4	7	24	23	18	39	35	52	31	39	10
October		1	5	15	20	9	27	82	12	30	45	8
November	1	6	4	12	13	13	16	71	23	18	37	5
December	2	8	2	26	16	3	21	43	29	64	50	8
Total	**3**	**75**	**80**	**193**	**187**	**139**	**452**	**384**	**376**	**489**	**332**	**152**
Progressive Total	**3**	**78**	**158**	**351**	**538**	**677**	**1129**	**1513**	**1889**	**2378**	**2710**	**2862**
Year wise Disposal	**0**	**6**	**27**	**81**	**98**	**123**	**145**	**159**	**264**	**303**	**278**	**187**
Total Disposal	**0**	**6**	**33**	**114**	**212**	**335**	**480**	**639**	**903**	**1206**	**1484**	**1671**





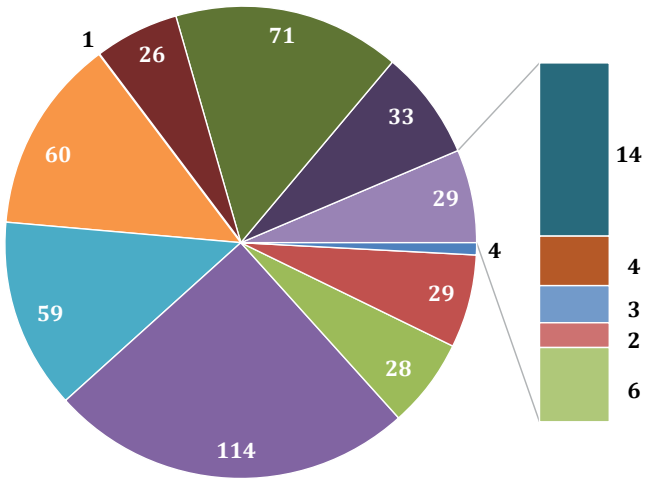
Effective Hearings



Details of Cases Listed vis-a-vis Hearings (DIAC)

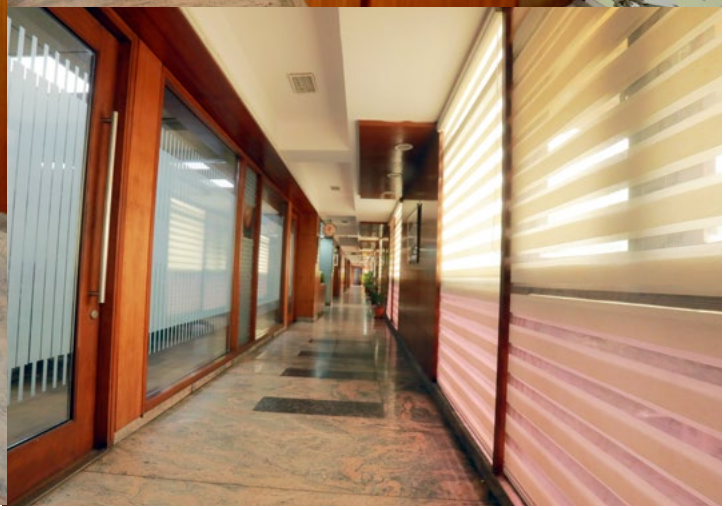
Year	Listed	Hearings
2015	2533	2162
2016	3903	3335
2017	5228	4452
2018	5522	4823
2019	7009	5829
2020	2290	1959

Panel of Arbitrators



Caterogy	Number
Former Chief Justice of India	4
Former Supreme Court Judges	29
Former High Court Chief Justices	28
Former High Court Judges	114
Former District & Session Judges	59
Former AD. Session Judges	60
Former Judicial Member CAT	1
Senior Advocates	26
Advocates	71
Engineers	33
Chartered Accountants	14
Bureaucrats	4
Architects	3
Professors	2
International Arbitrators	6
Total	**454**


DIAC
RECEPTION




DELHI INTERNATIONAL
ARBITRATION CENTRE
(DIAC)
EXIT


DIAC
RECEPTION

JUSTICE SANJAY KISHAN KAUL

Judge, Supreme Court of India

Justice Kaul was born on December 26, 1958, and studied in Modern School, New Delhi till 1976. He graduated in Economics (Hons.) from St. Stephen's College, Delhi University in 1979 and obtained his LL.B. Degree from The Campus Law Centre, Delhi University in 1982. In the same year, he enrolled as an Advocate with Bar Council of Delhi on July 15, 1982. Justice Kaul practiced mainly in the Commercial, Civil, Writ, Original and Company jurisdictions of the High Court of Delhi and the Supreme Court of India. He was also Treasurer of Delhi High Court Bar Association from 1985 to 1988.

Justice Kaul remained Advocate-on-Record of the Supreme Court of India from 1987 to 1999 and was designated as a Senior Advocate in December, 1999. He was appointed Senior Counsel for the Delhi High Court and for the Delhi University, was on the Senior panel of Union of India and served as the Additional Senior Standing Counsel for the DDA.

He was soon elevated as Additional Judge of the High Court of Delhi on May 03, 2001 and was appointed as a permanent Judge on May 02, 2003. He was appointed as the Acting Chief Justice of Delhi High Court w.e.f. 23.09.2012 to 25.09.2012. On 01.06.2013, Justice Kaul was elevated as the Chief Justice of the Punjab and Haryana High Court and later transferred as Chief Justice of Madras High Court on 28.07.2014. Justice Kaul was appointed as a Judge of the Supreme Court of India on 17.02.2017.

Evolving Dimensions of Public Policy in Arbitration Law

-Justice Sanjay Kishan Kaul[1]

Introduction

"The argument of public policy leads you from sound law, and is never argued but when all other points fail."[2] This instrument of last resort finds a place in the Arbitration and Conciliation Act, 1996 for laying a challenge to an international commercial arbitration[3] as being contrary to the 'public policy of India', or object to its enforcement if it is a 'foreign award'[4].

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1 Judge of Supreme Court of India; assisted by Ms. Aakanksha Kaul, Advocate [B.A. History (Hons.) LL.B. (Kings College London) LLM (Columbia University, New York)]; Mr. K.V. Kartik Subramanian, Advocate [B.Com., LL.B. (Hons.), Sastra University] and Ms. Tanvi Tuhina, Advocate (presently working as a Law Clerk with Justice Kaul) [B.A. LL.B. (Hons.) NALSAR University of Law, Hyderabad]

2 Burrough, J in *Richardson v. Mellish ,(1824),[(1824), 2 Bing. 252].*

3 The Arbitration and Conciliation Act, Section 2(1)(f), 1996,
defines 'international commercial arbitration' as *"an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-*
an individual who is a national of, or habitually resident in, any country other than India; or
a body corporate which is incorporated in any country other than India; or
or an association or a body of individuals whose central management and control is exercised in any country other
than India; or
the Government of a foreign country;".

4 The Arbitration and Conciliation Act, Section 44, 1996,
defines 'foreign award' as *"an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-*
in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette. Declare to be

From the very nature of things, the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition.[5] Burrough, J. described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you."[6] But, as the Master of the Rolls, Lord Denning, said "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles".[7] Unfortunately, the Indian courts have gradually expanded the meaning of 'public policy' and failed to keep in control the unruly horse. The Arbitration and Conciliation (Amendment) Act, 2015 ('the 2015 Amendment Act') attempts to narrow down the meaning of 'public policy' and bring the unruly horse back in control. Without attempting the impossible, i.e. defining 'public policy' precisely, the Amendment Act, inserts in the 1996 Act, a broad explanation for when an award will be in conflict with the public policy of India.[8]

The 2015 Amendment Act explains that an award will be in conflict with the public policy of India if:

(i) the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75[9] or Section 81[10]; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

The Amendment Act further expressly clarifies that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. The Amendment Act does not provide any further guidance regarding what constitutes 'fundamental policy of Indian law' or 'the most basic notions of morality or justice'. As is the case with the phrase 'public policy', it is not possible to place the expression 'the fundamental policy of Indian law' in the straitjacket of a definition.[11] The endeavour here is not to attempt to define the said phrases, but merely suggest broad principles that a Court ought to keep in mind at the time of considering the contention

territories to which the said Convention applies."
Part II of the Act applies to foreign awards. Section 48 in Part II lists the conditions under which enforcement of a foreign award may be refused."

5 *Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another, (1986), [(1986) 3 SCC 156].*

6 *Richardson v. Mellish, (1824), [(1824) 2 Bing 229, 252].*

7 *Enderby Town Football Club Ltd. v. Football Assn. Ltd., (1971), [(1971) Ch. 591, 606].*

8 The Arbitration and Conciliation (Amendment) Act, Sections 18 & 22, 2015, inserted Explanations 1 and 2 in Sections 34(2)(b) & 48(2) of the 1996 Act to clarify when an award would conflict the public policy of India.

9 The Arbitration and Conciliation (Amendment) Act, Section 75, 2015,
reads as *"Confidentiality.—Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement*".

10 The Arbitration and Conciliation (Amendment) Act,Section 81, 2015,
reads as *"Admissibility of evidence in other proceedings.—The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,—*
(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute; (b) admissions made by the other party in the course of the conciliation proceedings;
(c) proposals made by the conciliator;
(d) fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator".

11 *ONGC Ltd. v. Western Geco International Ltd. (2014), [(2014) 9 SCC 263].*

that an impugned Award is contrary to public policy.

To determine what these broad principles ought to be, and what the phrase 'public policy' and constituents ought to encompass, it is imperative to understand the purpose of the public policy exception.

Purpose of Public Policy

The importance of the concept of 'public policy' in arbitration law stems from the wisdom of the drafters of the New York Convention, who believed that permitting courts to refuse enforcement of arbitral awards based on the considerations of public policy was a necessary safety valve that would prevent intrusion on state sovereignty, if an award was irreconcilable with the enforcing country's legal structure.[12] Article V[13] of the New York Convention enables the signatory States to retain discretion to refuse enforcement of a foreign award and thereby, to retain some sovereign control over enforcement of foreign awards in their territory. The ground that enforcement of an award opposed to national public policy would be declined perhaps provides the strongest expression of a sovereign's reservation that its executive power shall not be used to enforce a foreign award which is in conflict with its policy.[14] However, such discretion can be exercised only on specified grounds and none other. Further, the said Article does not compel the member States to decline enforcement of foreign awards, even if the grounds stated therein are made out.

While applying the said public policy defence, the main objective of the New York Convention and the scope of the article must not be lost sight of. It must not be applied in a manner that frustrates the basic purpose of the New York Convention, i.e. to enforce awards.

Defining Public Policy

The doctrine of public policy is somewhat open-textured and flexible.[15] The Supreme Court of India has repeatedly observed that 'public policy' is not a static concept and could be almost useless if it were to remain fixed.[16] Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience.[17] Courts have defined and re- defined 'public policy' in broad, flexible terms. In the context of arbitration, this process of defining and re-defining the scope of 'public policy' has been guided primarily by policy concerns regarding finality of awards, efficiency, fairness and justice. Balancing of these concerns is often a complex task the result of which depends on what the judge in question values and the facts of the case. Indian courts have

12 Margaret Moses, Public Policy: National, International and Transnational, http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/ (last visited Jul 5, 2019).

13 New York Convention, Article V(2)(b), 1958,
provides that Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

14 *Cruz City 1 Mauritius Holdings v. Unitech Ltd., (2017), [2017 SCC OnLine Del 7810 : (2017) 239 DLT 649].*

15 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

16 *Murlidhar Agarwal and another v. State of U.P. and others, (1974), [1974 (2) SCC 472].*

17 *ONGC v. Saw Pipes, (2003), [(2003) 5 SCC 705].*

shuttled between two extremes. On the one extreme some judges have construed 'the public policy' defense so narrowly that critics say it must be characterized as a defense without any meaningful definition. On the other end of the spectrum are judges willing to examine plausible alternate views of the law and facts adopted by the arbitrator in the name of 'public policy considerations'. Contrary to international understanding and the objectives of arbitration legislation, mere violation of an Indian Law has been found to be in conflict with public policy. While some judges are guided by a motivation to minimize or increase court supervision of arbitration, others are guided by a sense of justice of the case. The 'public policy' objection is used as a catch all provision to invalidate awards that are otherwise valid and legitimate. Judge-centric interpretations, motivated by different concerns, have resulted in Courts arriving at different findings in cases with similar facts, despite applying similar standards. These observations are best illustrated through a brief overview of the Supreme Court jurisprudence on the meaning of 'public policy' over the last 20 years.

Brief History

Twenty years ago, while defining 'public policy' under the Foreign Awards (Recognition and Enforcement) Act, 1961[18], the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co*.[19] ('*Renusagar*') held that the scope of enquiry in proceedings for enforcement of a foreign award is very limited and cannot entail a review of the merits of the dispute. It was held that enforcement of a foreign award can be refused on the ground of it being contrary to public policy, if such enforcement would be contrary to (1) fundamental policy of Indian Law; or (2) the interests of India; or (3) justice or morality. The three expressions were kept open for judicial discretion and were not defined. However, the context of the case showed that the court declined to accept the contention that an international award that merely violated Indian law would be violative of 'public policy'. Where enforcement of an award violates the foreign exchange regulations or amounts to disregard of orders of superior courts, it was held in this case, that enforcement can be denied on the grounds of the award being contrary to the interests of India and the fundamental policy of Indian Law and hence, in conflict with the public policy of India.

A counsel associated with the case of *Renusagar*[20] opines that the decision validates the realism theory of law, enunciated by American jurist Karl Llewellyn. Judges are humans first and judges later.[21] They, invariably, first arrive at their sense of justice with respect to the case and thereafter, while stretching or adapting the law for consistency and future workability, ensure that the latter fits the former, and not vice versa. According to the counsel, *Renusagar* is a clear and strong example, amongst many others, of this overriding characteristic of judge-made law. The Court viewed *Renusagar* as an empowered and wealthy entity, which was violating commercial ethics by retaining large sums of GE money,

18 The Foreign Awards (Recognition and Enforcement) Act, 1961.

19 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

20 *Id.*

21 Abhishek Singhvi, *Memoirs of a Personal Journey Through Indian Arbitration Law*, IV Indian Journal of Arbitration Law (2016).

which comprised accumulated unpaid interest, and was not paying further interest on the latter. To punish *Renusagar* for its questionable conduct, the courts adopted what the counsel terms as "an artificially narrow and high threshold" for interpreting the phrase 'public policy', and restricted it to the old classic unconscionable public policy head, akin to prostitution, wagering and betting contracts etc.[22]

Irrespective of whether the Court in *Renusagar* was guided by a sense of justice in the facts of the case, or a desire to narrow the scope of court interference, the decision was consistent with international principles minimizing Court supervision. The standard found favour with the international community as well as amongst most practitioners in India, at least in the context of foreign awards. Two years later, the 1996 Act was promulgated and Indian arbitration laws consolidated. Unfortunately, despite the expressly stated objective of the 1996 Act to minimize court intervention, the subsequent cases under the 1996 Act gradually expanded the scope of 'public policy', and to an extent that allowed courts to re-examine factual findings by arbitral tribunals.

In 2003, the Supreme Court in *ONGC Ltd v Saw Pipes Ltd.*[23] (*'Saw Pipes'*), a case under Section 34 of the 1996 Act, expanded the definition of 'public policy' to include a fourth ground, i.e. patent illegality. The Court clarified that such illegality must go to the root of the matter, and if it is of trivial nature, it cannot be held to be against public policy.

Applied in the very narrow sense suggested by the Court, the inclusion of 'patent illegality' as a ground for finding a domestic award to be in conflict with public policy is not problematic. The ground would have been satisfied in rare cases. It struck an acceptable balance between concerns regarding finality of awards and fairness and justice. The problem arose subsequently when the impact of the decision got magnified due to an expansive application of the criterion. The 'patent illegality' test was used by Courts to justify a review of the merits of the case. More problematically, the criterion was introduced into the jurisprudence on cases of enforcement of foreign awards. This has been coupled with the propensity of lawyers for filing objections akin to civil appeals, lacking in any precision.

The Delhi High Court sought to limit the scope of the decision to section 34 cases, applying the *Renusagar* approach to cases of enforcement of foreign awards under Section 48 of the 1996 Act.[24] A subsequent attempt by the Apex Court in *Phulchand Exports Ltd. v OOO Patriot*[25] to include 'patent illegality' under the term 'public policy of India', while examining enforcement of a foreign award under Section 48 of the 1996 Act, was defeated in *Shri Lal Mahal Ltd. v Progetto Grano Spa*[26] wherein the Supreme Court held the interpretation given by *Renusagar*[27] to be correct in respect of Section 48 of the 1996 Act.

In 2014, the Law Commission issued a report *inter alia* recommending the insertion of

22 *Supra 21.*

23 *ONGC v. Saw Pipes, (2003), [(2003) 5 SCC 705].*

24 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., (2008), [2008(4) Arb. LR 497 (Delhi)].*

25 *Phulchand Exports Ltd. v. OOO Patriot, (2011), [(2011) 10 SCC 300].*

26 *Shri Lal Mahal Ltd v. Progetto Grano Spa, (2014), [(2014) 2 SCC 433].*

27 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

Explanation 1 to Sections 34& 48, whereby it is clarified when an award is in conflict with 'public policy'. The said amendment was viewed as adequate to ensure that the Courts adopt a narrow approach in the application of the concept of public policy, and that they do not review the merits in cases arising from international commercial arbitrations and foreign awards.[28]

Soon thereafter, in *ONGC Ltd. v Western Geco International Ltd.*,[29] a case originally filed under Section 34 of the 1996 Act, a three-judge bench of the Supreme Court held that the expression 'fundamental policy of Indian Law' includes all such fundamental principles as providing a basis for administration of justice and enforcement of law in India. The Court then enumerated three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the 'fundamental Policy of Indian law' namely, (i) tribunal is bound to adopt a 'judicial approach', (ii) the tribunal must decide in accordance with the principles of natural justice and (iii) the decision must not be so perverse or so irrational that no reasonable person would have arrived at the same. The Court clarified that the enumeration was not exhaustive. The Court further held that if on the facts proved before them, the arbitrators fail to draw an inference which ought to have been drawn, or if they have drawn an inference which is on the face of it, untenable, resulting in miscarriage of justice, the adjudication, even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards, would be open to challenge and would be cast away or modified, depending upon whether the offending part was or was not severable from the rest.[30]

Then came the decision in *Associate Builders v Delhi Development Authority*.[31] The Court, bound by the decision in *Western Geco*,[32] applied the standards suggested in that case but arrived at a different result. In *Western Geco*,[33] the Court found that the Tribunal committed an error in the manner it calculated the period of delay, resulting in miscarriage of justice, apart from the fact that it failed to appreciate and draw inferences that logically flowed from such proved facts. The Court thus, had "no hesitation in rejecting the contention urged on behalf of the respondent that the arbitral award should not despite the infirmities pointed out by us be disturbed."[34] In *Associate Builders*,[35] the challenge was again regarding the calculation of the period of delay and the resulting damages. However, in contrast to *Western Geco*,[36] the Supreme Court in *Associate Builders*[37] set aside the High Court decision which interfered with the Arbitral Award. The Court found that the High Court exceeded its jurisdiction in interfering with a pure finding of fact and differing with a possible view of the Arbitrator on facts. The Supreme Court clarified that

28 Amendments to the Arbitration and Conciliation Act 1996, Law Commission of India Report No. 246 (2014).
29 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*
30 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*
31 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*
32 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*
33 *Id.*
34 *Id.*
35 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*
36 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*
37 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

a Court has no business to enter into a pure question of fact. The Arbitrator is the sole Judge of the quantity and quality of evidence before him. The Court cautioned that even when considering whether an award is contrary to the fundamental policy of India, due weight must be given to a determination by an arbitrator – especially on questions of fact. In particular, the Court recognized that the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his Arbitral Award, and therefore even an Award based on "*little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.*"[38]However, the Court confirmed that the merits of an arbitral award could be looked into under certain specified circumstances.[39]

Some relevant principles that can be culled out from *Associate Builders*[40] are as hereunder:

1. Disregarding orders passed by superior Courts in India could be regarded as a contravention of the 'fundamental policy of Indian law', but the recovery of compound interest on interest, being contrary to statute only, would not contravene any 'fundamental policy of Indian law' [reliance was placed on the decision in *Renusagar*[41] in this regard].
2. The principle of *audi alteram partem* is a fundamental juristic principle in Indian law.
3. An award can be said to be against justice only when it shocks the conscience of the Court.
4. 'Morality' is generally confined to sexual morality, which in the context of an arbitral award would mean the enforcement of an award, say, for specific performance of a contract involving prostitution. 'Morality' would, if it is to go beyond sexual morality, necessarily cover such agreements as are not illegal, but could not be enforced given the prevailing mores of the day. However, interference on this ground would also be only if something shocks the Court's conscience.
5. The following will amount to 'patent illegality' -
   (a) a contravention of the substantive law of India, if it goes to the root of the matter, and is not of a trivial nature;
   (b) a contravention of the Arbitration Act– for example, if an Arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act;
   (c) a contravention of the terms of the contract, if the Arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

Thus, over a period of 20 years, the Courts moved from a very narrow interpretation

38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*

of 'public policy' in *Renusagar*[42] to an over-broad interpretation of 'public policy'. This continuously expanding interpretation even after the Law Commission Report[43] caused the Law Commission to publish a Supplementary Report[44] whereby Explanation 2 to Sections 34 & 48 of the Act was inserted. Accepting most recommendations of the Law Commission, including the recommendation to insert Explanations 1 and 2 to Sections 34 & 48 of the Act, the Legislature enacted the 2015 Amendment Act.

The 2015 Amendment Act

The main objectives of the 1996 Act were to make provisions for an arbitral procedure that is fair and efficient, and to minimise the supervisory role of Courts in the arbitral process.[45] The 1996 Act was viewed as having failed to meet many of its stated objectives, particularly that of ensuring efficiency and reducing the role of courts in the arbitral process. This failure is reflected in the above discussed jurisprudence on the scope of 'public policy' under Sections 34 & 48 of the 1996 Act. The Courts expanded, rather than minimizing the supervisory role of courts in the arbitral process. Excessive judicial intervention by Indian Courts has become an important reason for even Indian parties preferring to institute arbitration proceedings abroad. Thus, two important objectives of the 2015 Amendment Act are to bring the arbitration practice in India in conformity with international principles and to reduce extensive judicial intervention in arbitration matters. The ultimate aim is not just to stem the shift away from India, as a preferred seat for international commercial arbitrations in favour of more investor-friendly jurisdictions, but to develop India into a global hub for arbitration and legal process outsourcing.[46]

In furtherance of the aforesaid objective, the 2015 Amendment Act attempts to narrow down the meaning of 'public policy'. The formulation of 'public policy' in the 2015 Amendment Act is even tighter than in *Renusagar.*[47] 'Interests of India' and 'patent illegality' are no longer grounds for challenge under the head of 'public policy of India'. The Law Commission was of the view that the term 'interests of India' is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations or foreign awards.[48] 'Patent illegality' is a separate ground available for challenging domestic awards only, and not international commercial awards. Further, the scope of 'patent illegality' has been limited by adding a proviso that an award shall not be set aside merely on the ground of an erroneous application of the law, or by re- appreciation of evidence.[49] A further narrowing down of the phrase emanates from replacing 'justice or morality' (referred to in *Renusagar*[50] and the judgments that followed) with the 'most basic notions of morality or justice'.

42 *Id.*
43 *Supra 31.*
44 Supplementary to Report No. 246 dated February, 2015
45 *Fuerst Day Lawson Ltd. and Ors. etc. etc. v. Jindal Exports Ltd. and Ors. etc., (2011), [(2011) 8 SCC 333], Para 89.*
46 *Supra 31.*
47 *Id.*
48 *Supra 31.*
49 The Arbitration and Conciliation Act, Section 34 (2A), 1996.
50 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

'Contravention with fundamental policy of Indian law' has been retained as a ground but an enquiry in this regard shall not entail a review on the merits of the dispute.

The question that then arises is whether the objective of the 2015 Amendment Act would have been better served by not including any reference to 'fundamental policy of Indian law'. Drawing on Article I of the Geneva Convention, early drafts of the New York Convention permitted non- recognition of an award if it violated 'fundamental principles of the law.'[51] However, based on the view of a Working Party that the public policy exception should not have a broad scope of application and its recommendation, reference to 'fundamental principles of law' was omitted. The aim of the New York Convention's drafters was to limit "the scope of the public policy clause as far as possible".[52] The drafters feared that the public policy exception would be invoked to advance parochial, local interests and would thereby frustrate the basic objective of fostering the enforceability of foreign and non-domestic awards. That risk was thought to be particularly great, given the wide disparities among national legal systems and their public policies in a global instrument such as the New York Convention.[53] Yet, public policy exceptions under the New York Convention and UNCITRAL Model laws focus on national public policy.

Whether reference to 'fundamental policy of Indian law' will frustrate the basic objective of the New York Convention and the 2015 Amendment Act will depend on the Courts. An expansive definition, readiness to interfere with awards or a tendency to advance parochial, local interests will discourage parties from arbitrating in India and thereby, defeat India's aspiration to be an international arbitration centre. Similarly, if interference from Indian courts is excessive at the enforcement stage and awards passed in other member states are not given due recognition, other member states may be less inclined to give reciprocal recognition to awards passed in India.

It is thus heartening to see that having appreciated the objective of the 2015 Amendment Act, the Delhi High Court[54] has recently held that the 'public policy' defense cannot be equated to offending particular provision or a statute. Contravention of any particular provision of an enactment is not synonymous to the contravention of the 'fundamental policy of Indian law'. The expression 'fundamental policy of Indian law' refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression 'fundamental policy' connotes the basic and substratal rationale, values and principles which form the bedrock for laws in our country. It is necessary to bear in mind that a foreign Award may be based on foreign law, which may be at variance with a corresponding Indian statute. If the expression 'fundamental policy of Indian law' is considered as a reference to a provision of the Indian statute, the basic purpose of the New York Convention, to enforce foreign awards would stand frustrated. One of the principal objectives of the New York Convention is to ensure enforcement of awards, notwithstanding that the awards are not rendered in conformity with the national laws.

51 Born, Gary International Commercial Arbitration (2nd ed.).

52 Id.

53 Id.

54 *Cruz City 1 Mauritius Holdings v. Unitech Ltd., (2017), [2017 SCC OnLine Del 7810: (2017) 239 DLT 649].*

Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy, which the State cannot be expected to compromise. The expression 'fundamental policy of law' must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy, and not a provision of any enactment.[55]

It is interesting that in the same judgment, the Delhi High Court[56] also held that by using 'may' as opposed to 'shall' in Section 34(2) of the Act, the legislature has granted to the Court a discretion, albeit not an 'absolute discretion', to refuse to set aside an Award, or refuse its enforcement, even if the Award is in conflict with the 'public policy' of India, provided there is sufficient reason to do so.[57] Envisaging a situation where permitting as well as declining enforcement would fall foul of the public policy, the Court held that courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award – considering that parties ought to be held bound by the decision of the forum chosen by them, and that there is finality of litigation – or to enforce the same i.e., whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. The Court noted that in such cases, the Court would be compelled to evaluate the nature, extent and other nuances of public policy involved and adopt a course which is less pernicious. While considering the question whether to decline enforcement of a foreign Award on the ground of public policy, the Court is also required to consider the nature of the policy that is alleged to have been contravened. The approach should be one that favours enforcement of a foreign Award and if the public policy considerations can be addressed without declining recognition of the foreign award, the Court would lean towards such a course.[58] While the said observation was not guided by any express amendment to the provisions of the Act, it does reflect the general pro- arbitration approach encouraged by the 2015 Amendment Act.

Another question which arises is whether Courts ought to adopt different approaches while applying the public policy exception under Sections 34 and 48 of the 1996 Act. It may be relevant to note that although the grounds under Sections 34 and 48 of the 1996 Act are *in pari materia*, and the jurisprudence with respect to both the provisions has developed in parallel, influencing each other, Courts have appreciated that the analysis required when setting aside a domestic award and when refusing to enforce a foreign award may be different. The concept of enforcement of the award, as opposed to determining whether an award passed in India ought to be set aside or not, is different. The jurisdiction of the Court at the stage of enforcement should be very limited. While a Court exercising jurisdiction under Section 34 of the Act is not sitting in appeal, a Court ought to be allowed to set aside awards where the Arbitrator has chosen to completely disregard a law going to the root of the dispute, despite being aware of that law. Parties seeking to enforce foreign awards in India may be able to raise such objections before the

55 *Cruz City 1 Mauritius Holdings v. Unitech Ltd., (2017), [2017 SCC OnLine Del 7810 (2017) 239 DLT 649].*

56 *Id.*

57 *Id.*

58 *Id.*

Courts of the seat of the arbitration, if permissible in that country. Efficiency and finality of awards are important concerns but should not lead to complete subversion of justice and fairness. It is possibly for this reason that the 'patent illegality' ground has been retained in respect of Section 34 of the 1996 Act by the 2015 Amendment Act (albeit with a narrower scope inasmuch as it does not include erroneous application of law and does not permit re-appreciation of evidence).

The analysis at the stage of enforcement ought to be different for one other reason. Giving due recognition to international principles of comity, Courts should attempt to give preclusive effect to issues and claims decided by foreign Courts at the seat of arbitration. Deference to decisions of other courts may also increase efficiency, preventing parties from re-litigating the same issues and claims before two forums.

Post-amendment Era

Now to the principal question, i.e. what may be held to constitute the 'public policy of India', particularly in view of judgments delivered in the last two years.

Broadly speaking, Courts may not set aside awards or refuse enforcement where the Arbitral Tribunal's interpretation of a contract is contrary to local law, or where damage is caused to local commercial interests. An Award may be set aside or denied enforcement because the award or its enforcement contravenes fundamental policies articulated in constitutional instruments, basic civil or property rights, or is an element of a criminal scheme, or where enforcement of the Award would allow parties to contravene substantive rights and issues such as anti-trust or securities laws.

An appreciation of the founding laws of India can help arrive at an understanding of those substantive rights which may not be contravened in an Award, and which warrant interference of the Courts

A. Basic Structure, Fundamental Rights and Directive Principles

The primacy of the Constitution of India is well-established. In determining whether an award is in contravention with the fundamental policy of Indian law, the court can always be guided by the Preamble to the Constitution and the principles underlying Fundamental Rights and Directive Principles of State Policy, as enshrined in the Indian Constitution.[59] The Supreme Court has also recognized that the Constitution has certain basic features and this 'basic structure' cannot be altered, or destroyed, or amended even by the Parliament.[60] An award may be set aside, or enforcement of a foreign award refused, when the award or the enforcement thereof violates principles underlying the basic structure of the Constitution of India, or Fundamental Rights, or the Directive Principles contained therein. The Courts have experience in narrowly construing the basic structure doctrine. The jurisprudence in this regard can serve as a source of guidance.

59 *ONGC v. Saw Pipes, (2003), [(2003) 5 SCC 705].*

60 *Keshavananda Bharati v. State of Kerala, (1973), [AIR 1973 SC 1461].*

B. Disregard of Orders/ Judgements of Superior Courts

The Courts derive their power from the Constitution. The principle that the binding effect of the judgment of a superior Court must not be disobeyed can be described as a Constitutional principle and fundamental to the policy of Indian law.[61] The Supreme Court has rightly held that any action that involves disregard for orders of superior Courts would adversely affect the administration of justice and would be destructive of the rule of law and be contrary to public policy.[62]

The aforesaid law has been taken further in a recent judgment of the Supreme Court, where it was held that disregarding the binding effect of the judgment of a superior court could be regarded as a contravention of the fundamental policy of Indian law.[63] This approach would also be consistent with the principle of *res judicata* which would also require that awards are not passed in conflict with prior decisions. *Res judicata* is an internationally recognized fundamental principle of Indian law. The concern of Indian courts may be limited to cases where the award conflicts with prior decisions of Indian Courts. Where the award conflicts with prior decisions of other forums, the Courts may be less reluctant to find the award to be in contravention of the fundamental policy of Indian law. It will be interesting to see how Courts deal with challenges on the ground that an award disregards the binding effect of the judgment of a superior court since a Court cannot entail a review on merits of the dispute. Further, not just under Section 48 of the Act, but even under Section 34 of the Act, an award cannot be set aside on the grounds of an erroneous application of law.

C. Protection of minors

The Delhi High Court[64] has held that the protection of minors is a fundamental policy of Indian law and is a substratal principle on which Indian law is founded. Hence, a minor cannot be guilty of having perpetuated fraud, either himself, or through any agent. Supported by this reason, and also for having found the award (of which enforcement was being sought) to be shockingly disproportionate against the minor Respondents, the Court has on occasion declined to enforce an arbitral Award against minors.[65]

On the particular facts of the case referred to above, fraud was committed by the natural guardian/agent of the minors. The decision may have been different if the fraud was perpetuated by an award debtor who is a minor as per Indian law but not as per the applicable foreign law chosen by the parties.

Further, whereas protection of minors may be considered a fundamental policy of Indian law, it is doubtful whether the Courts ought to go into the proportionality of awards, particularly when acting as an enforcing Court.

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61 The Constitution of India, Article 129, 1951,
"the Supreme Court shall be a court of record and shall have all powers of such a court including the power to punish for contempt of itself".

62 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

63 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

64 *Daiichi Sankyo Co. Ltd. v. Malvinder Mohan Singh & Ors., (2018), [2018 SCC OnLine Del 6869].*

65 *Id.*

D. Awards that facilitate Criminal Acts

An award that encourages corruption and official bribery or requires payment of the proceeds of corruption may be found to contravene the fundamental policy of Indian law or the most basic notions of justice or morality. In other words, where an Award requires or allows parties to engage in criminally prohibited acts such as terrorism, piracy, slave-trading, drug smuggling, torture, murder, kidnapping and robbery, the Award is likely to be set aside or refused enforcement. Instances of Awards facilitating such acts being passed are highly unlikely. However, wide disparities exist among national legal systems and thus, what may be prohibited in one country may be legal in another.

One example is the case of gambling. Gambling is illegal in most states in India. An award that facilitates gambling, which would otherwise be illegal in India, may be enforced in India. Another example, given in *Associate Builders*[66] is that of prostitution. Enforcement of an award for specific performance of a contract involving prostitution may be refused. Similarly, sale of marijuana is legal in certain countries, but an award facilitating its sale in India may be found to be contrary to the fundamental policy of India, or even basic notions of morality and justice.

At this stage, it is relevant to note that the Supreme Court[67] has held that when it comes to the defence of 'public policy' of India, based upon the "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances, when the conscience of the Court is shocked by the infraction of fundamental notions or principles of justice. However, the Court also held that the test for whether an Award is contrary to 'the most basic notions of morality or justice' will continue to be the test used for 'morality' and 'justice' i.e., whether the Award shocks the conscience of the Court.[68] The Supreme Court[69] cited with approval the following illustrations for when the conscience of the court would be shocked (as given in *Associate Builders*[70] prior to the 2015 Amendment Act):

i. A claimant is content with restricting his claim, let us say to Rs. 30 lakhs in a statement of claim before the arbitrator and at no point does he seek to claim anything more. The Arbitral Award ultimately awards him Rs.45 lakhs, without any acceptable reason or justification.

ii. A, who is B's *Mukhtar* i.e., head of local government of a town or village, promises to exercise his influence, as such, with B, in favour of C, and C promises to pay Rs.1,000/- to A. The agreement is void because it is immoral.

iii. A agrees to let her daughter to be hired to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (XLV of 1860)

66 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

67 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

68 *Id.*

69 *Id.*

70 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

The Supreme Court[71] has also held to be good law post the 2015 Amendment Act the observation in *Associate Builder*[72] that morality would cover agreements that are not illegal but, would not be enforced given the prevailing mores of the day, if they shock the Court's conscience.

Considering the legislature has narrowed the phrase by referring to 'most basic notions of morality or justice' as opposed to 'morality or justice', possibly the test also requires a review and needs to be narrower and stricter. The expressly stated intention was to ensure that Indian law reflects an internationally recognized formulation, and terms used in *Renusagar*[73] cannot be used to widen the test.[74]

The phrase 'most basic notions of morality or justice' can be traced to the American case of *Parsons &Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*,[75] wherein the Court held that enforcement of foreign arbitral awards may be denied on the basis of the public policy defense, only where the enforcement would violate the forum state's most basic notions of morality and justice. The Court in that case relied upon the judgment in *Loucks v. Standard Oil Co.*,[76] which suggests that for a Court to refuse enforcement of a foreign right, there must be violation of some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal, or the public policy of the State must be outraged. The High Court of Singapore has stated that to succeed on a public policy argument, the party "had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice".[77]

E. Principles of Natural Justice

In *Western Geco*[78] the Supreme Court held to be fundamental to the policy of Indian law, not only the principle that the Tribunal must decide in accordance with the principles of natural justice, which includes the '*audi alteram partem*' rule, but also that the Court/Authority deciding the matter must apply its mind to the attendant facts and circumstances. The Court then explained that the application of mind is best demonstrated by disclosure of the mind and that disclosure of the mind is best done by recording reasons in support of the decision which the Court or authority is taking. In *Associate Builders*[79] the Court added an important caveat, a Court applying the 'public policy' test to an arbitration award does not act as a Court of Appeal, and consequently errors of fact cannot be corrected. The Supreme Court has recently held that the violation of principles of natural justice will

71 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

72 *Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49.*

73 *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

74 Law Commission of India Report No. 246 titled 'Amendments to the Arbitration and Conciliation Act 1996, dated August, 2014.

75 *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, (1974), [508 F.2d 969, 974 (2d Cir. 1974)].*

76 *Loucks v. Standard Oil Co., (1918), [224 N.Y. 99, 111, 120 N.E. 198 (1918)]*, Reliance was also placed on Restatement (second) of conflict of laws s.117, comment c, at 340 (1971)'.

77 *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte), (2010), [[2010] 3 SLR 1]; BAZ v. BBA & Ors, (2018), [[2018] SGHC 275].*

78 *ONGC Ltd. v. Western Geco International Ltd.,(2014),* [(2014) 9 SCC 263].

79 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

continue to be a ground for challenging an Award, even after the 2015 Amendment Act.[80]

However, it is doubtful whether now a Court can go into the question of whether the Arbitrator has applied its mind or not, or even whether the Arbitrator has recorded reasons or not under the garb of 'public policy of India', particularly when deciding a petition under Section 48 of the Act. An award may be set aside where one party is denied any opportunity to be heard, without any reasoning. However, the Courts may not be able to examine whether the opportunity given for hearing was adequate, or whether the reasons for denying hearing were appropriate, or whether the party was given adequate hearing and opportunity to present its case.

Now to the principles that may not be described as public policy of India.

A. Foreign Exchange Laws

The Foreign Exchange Regulation Act, 1973 ('FERA')[81] has been described by the Courts as a statute enacted for the "national economic interest", and the object of various provisions in the said Act is to ensure that the nation does not lose foreign exchange, which is very much essential for the economic survival of the nation. Keeping in view the said objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, the Supreme Court in *Renusagar*[82] was of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India.[83] As explained hereinabove, 'interests of India' is no longer available as a ground to challenge an award. Thus, all violations of foreign exchange laws may not lead to a finding of contravention of 'fundamental policy of Indian law'. Injury to commercial interests may not be a sufficient ground to set aside an award or refuse enforcement of an award. However, where an Award or its enforcement thereof, in effect allows parties to achieve a result that would otherwise be impermissible under foreign exchange laws, the Award may be set aside or enforcement refused. For example, if an arbitral Award makes transfer of funds impermissible under foreign exchange laws, the Award may not be enforced. Parties cannot, by procuring an arbitration, conceal that they are seeking to enforce an illegal contract. This may be required to preserve the integrity of the arbitral process, and to see that it is not abused. The Delhi High Court[84] has recently held that violation of any regulation or any provision of FEMA would not *ipso jure* offend the 'public policy' of India.

However, a nebulous situation may be created by the fact that *Associate Builders v. DDA*[85] suggests that violation of the Foreign Exchange Act would be regarded as being contrary to the fundamental policy of Indian law. Reliance in this regard can be placed on

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80 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

81 FERA has been replaced by the Foreign Exchange Management Act, 1999.
"Any offence under FERA was a criminal offence. Offence under FEMA is a civil offence."

82 *Supra.*

83 *Renusagar Power Co. Ltd. v. General Electric Co., (1994), [A.I.R. 1994 S.C. 860].*

84 *Cruz City 1 Mauritius Holdings v. Unitech Ltd, (2017), [2017 SCC OnLine Del 7810: (2017) 239 DLT 649].*

85 *(2015) 3 SCC 49.*

the decision in *Renusagar*.[86] However, in *Renusagar*,[87] violation of foreign exchange laws was found to be contrary to the 'interest of India' (as opposed to 'fundamental policy of Indian law'), and that ground is no longer a component of the 'public policy of India'. The situation is further complicated by the fact that in a recent post-amendment judgment,[88] the Supreme Court has cited the said reliance/observation in *Associate Builders v. DDA*[89] with approval.

B. Unjust Enrichment

The principle of unjust enrichment finds recognition in the Indian Contract Act, 1872.[90] In *Renusagar*,[91] the Supreme Court did not decide the question whether the principle of unjust enrichment is a part of the public policy of India but held that even if it be assumed that unjust enrichment is contrary to public policy of India, for the court to refuse enforcement of the award, the unjust enrichment must relate to the enforcement of the Award and not to its merits, in view of the limited scope of enquiry in proceedings for the enforcement of a foreign Award.[92] Merely because the principle of unjust enrichment finds recognition in the Indian Contract Act, does not imply that it is a fundamental policy of Indian law. A determination of whether either party has been unjustly enriched as a consequence of the Award or its enforcement will often require Courts to review merits, which would be a violation of the Act.

B. Award of Interest and Damages

The Supreme Court[93] has on several occasions declined to interfere with awards of interest on damages, and interest on interest i.e., compound interest. This position of law has been held to be correct even post the 2015 Amendment Act by the Supreme Court.[94] Similarly, the Delhi High Court has refused to interfere with the computation of damages, and found that it does not contravene the 'fundamental policy of Indian law'.[95] Whether and to what extent must interest and damages be granted must be determined according to the applicable law, agreed between the parties, and is likely to be regarded as a question for the Arbitrator to decide.

D. Limitation

In a challenge to an enforcement of a foreign award, the Delhi High Court refused to interfere with a finding that the claim was not barred by limitation and held that it did

86 *Renusagar Power Co. Ltd. v. General Electric Co., (1994), [A.I.R. 1994 S.C. 860].*

87 *Renusagar Power Co. Ltd. v. General Electric Co., (1994), [A.I.R. 1994 S.C. 860].*

88 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

89 *(2015) 3 SCC 49.*

90 The Indian Contract Act, Sections 70 and 72, (1872).

91 *Renusagar Power Co. Ltd. v. General Electric Co., (1994), [A.I.R. 1994 S.C. 860].*

92 *Renusagar Power Co. Ltd. v. General Electric Co., (1994), [A.I.R. 1994 S.C. 860].*

93 *M/s. Harish Chandra & Company v. State of U.P, (2015), [(2015) 3 SCC 49]*; *Renusagar Power Co. Ltd. v. General Electric Co, (1994), [A.I.R. 1994 S.C. 860].*

94 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

95 *Daiichi Sankyo Co. Ltd. v. Malvinder Mohan Singh &Ors., (2018), [2018 SCC OnLine Del 6869].*

not contravene the 'fundamental policy of Indian law'.[96]

The Supreme Court has held that the Limitation Act is one based on public policy, its aim being to secure peace in the community, suppress fraud and perjury, quicken diligence and prevent oppression. The object for fixing time limit for litigation is based on the public policy of fixing a life span for legal remedy, for the purpose of general welfare. The concept of limitation is meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. It seeks to bury all acts of the past which have not been agitated unexplainably and have, from lapse of time, become stale.[97]

However, it is doubtful that the principles of limitation can be considered fundamental to the policy of Indian law. Further, if parties have opted to be governed by laws that do not recognize the principle of limitation, or recognize it in a manner different from India, Indian Courts may not be able to refuse the enforcement of an award on the ground that the award violates the Limitation Act. Moreover, often the question of limitation is a question of fact, or a mixed question of law and fact. Thus, Courts may have to refrain from interfering with the findings on the issue of limitation, even when deciding petitions under Section 34 of the Act.

The Delhi High Court[98] recently declined to interfere with the finding of the Arbitrator that the claims before it were barred by limitation. A Division Bench of the Delhi High Court held that limitation is no doubt a mixed question of fact and law and the Arbitrator is a master of both facts and law. Thus, it is not open to a court sitting as an appellate court in an appeal under Section 37 of the Act to go behind the finding of when the cause of action had arisen. The Division Bench reiterated the law that the arbitrator is the final authority on facts as well as law.[99]

E. Judicial Approach

In *Western Geco*,[100] the Supreme Court held that the 'fundamental policy of Indian Law' includes the principle that a tribunal is bound to adopt a 'judicial approach' in the matter, which means that it cannot act in an arbitrary, capricious or whimsical manner; that it must act *bona fide* and deal with the subject in a fair, reasonable and objective manner, and that its decision is not actuated by any extraneous consideration. Judicial approach acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge. In *Associate Builders*,[101] the court added an important caveat – a court applying the 'public policy' test to an arbitration award does not act as a Court of appeal, and consequently errors of fact cannot be corrected. The Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not

96 *Id.*

97 *Basawarajv. The Spl. Land Acquisition Officer, (2013), [(2013) 14 SCC 81]; Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project, (2008), [(2008) 17 SCC 448]; Popat and Kotecha Property v. SBI Staff Assn., (2005), [(2005) 7 SCC* 510].

98 *Daiichi Sankyo Co. Ltd. v. Malvinder Mohan Singh &Ors., (2018), [2018 SCC OnLine Del 6869].*

99 *Id.*

100 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*

101 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then his is the last word on facts.

However, post the 2015 Amendment Act, the Supreme Court[102] has rightly held that a Court cannot intervene on the ground that the Arbitrator has not adopted a judicial approach since on merits of the dispute, review has been expressly barred, when a challenge lies on 'public policy grounds'. Further, even when determining whether a domestic award is patently illegal, the Court cannot re-appreciate evidence or set aside an award on the grounds of erroneous application of law.

F. Wednesbury unreasonableness

The third principle held to be a component of 'fundamental policy of Indian law' in *Western Geco*[103] was the Wednesbury principle of reasonableness i.e., that the decision must not be so perverse or so irrational that no reasonable person would have arrived at the same. The Court explained that where a finding is based on no evidence, or an arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. Post the 2015 Amendment Act, the Supreme Court[104] has rightly held that an award cannot be challenged as being perverse under the garb of 'public policy of India'.

Patent Illegality

Despite the aforesaid explicit rejection of the principle of 'Wednesbury unreasonableness', it is surprising that the Supreme Court[105] held the following paragraphs of the decision in *Associate Builders v. DDA*[106] to be defining 'patent illegality appearing on the face of the award':

> *31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where a finding is based on no evidence, or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.*
>
> *A good working test of perversity is contained in two judgments. In Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons,*[107] *it was held:*

102 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

103 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*

104 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

105 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

106 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

107 *1992 Supp (2) SCC 312 at p. 317*

> *"7 It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."*
>
> *In Kuldeep Singh v. Commr. of Police,*[108] *at para 10, it was held:*
>
> *"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

The Supreme Court explained that a finding based on no evidence at all, or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of 'patent illegality'. Additionally, a finding based on documents taken behind the back of the parties by the Arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.[109] While applying the said standard to determine whether an award is 'perverse' and hence, 'patently illegal', Courts will have to be extremely cautious to avoid re-appreciation of evidence which is expressly prohibited by the Act itself.

The recent judgment of the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[110] (referring to the principles in *Associate Builders v DDA*[111] and *Western Geco*[112]) provides the following guiding principles regarding the scope of 'patent illegality':

a) A mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an Arbitral Award. However, if an Arbitrator gives no reasons for an award, and contravenes Section 31(3) of the 1996 Act, that would certainly amount to 'patent illegality' on the face of the Award.

b) The construction of the terms of a contract is primarily for an Arbitrator to decide. However, an award will be patently illegal if the Arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, the Arbitrator's view is not even a possible view to take.

c) If the Arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction and hence, the award may be deemed

108 *(1999) 2 SCC 10.*

109 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

110 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

111 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

112 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*

patently illegal.

In the past, 'patent illegality' was the most often relied upon ground to challenge an award. With time, the scope of this term was also expanded to include the most whimsical grounds for challenging an award and hence excessive Court interference with Awards was facilitated. In view of the 2015 Amendment Act, 'patent illegality' is not included in the 'public policy of India' and no foreign award can be challenged on that ground. It is thus imperative that Courts must consciously ensure that:

firstly, 'patent illegality' is not brought into the ambit of 'public policy of India' through a backdoor; and secondly, the intent of the legislature and the Law Commission,[113] to ensure that 'patent illegality' is construed more narrowly than in the past, is not defeated.

'Patent illegality' is an independent ground to challenge domestic awards, but that does not permit Courts to interfere on the ground of erroneous interpretation of law, or re-appreciate evidence. It is also relevant to note that such 'patent illegality' must now appear on the face of the award. This means that 'patent illegality' requires a narrower interpretation, and definitions of 'patent illegality' in pre-amendment cases may not be considered good law.

Post the 2015 Amendment Act, the Supreme Court has held that the test for 'patent illegality' continues to be whether the illegality goes to the root of the matter or not and that it is not trivial.[114] Thus, this may be perceived to be a path backward. Ultimately, whether it is a step backward or forward will depend on how the Courts apply this test. Though the Supreme Court [115] clarified that contravention of a statute not linked to public policy or public interest cannot be brought in by the backdoor when it comes to setting aside an Award on the ground of 'patent illegality', the parameters of 'patent illegality' set out by Supreme Court leaves room for re-appreciation of evidence. A Division Bench of the Delhi High Court[116] recently in March, 2019 held that the position of law stands crystalised that findings of fact and law of the Arbitral Tribunal/Arbitrator are ordinarily not amenable to interference under Section 34 or Section 37 and can only be interfered if they are perverse or contrary to contractual terms. In this regard, reliance was placed on the decisions of the Supreme Court in *Mcdermott International Inc. v. Burn Standard Co. Ltd.*[117] and *Associate Builders*,[118] i.e., decisions prior to the 2015 Amendment Act. Ultimately, the Court declined to interfere with the Arbitrator's findings and award.[119] It is doubtful whether a court can interfere with an award merely on the ground that it is contrary to contractual terms. Even if the test of *Associate Builders*[120] is applied, for the Court to interfere the Arbitrator would have to take a view that is not even a possible view to take.

113 *Supra 109.*

114 *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019), [2019 SCC OnLine SC 677].*

115 *Id.*

116 *Deepak Kumar &Ors. v. Manoj Gupta, (2009), [2019 SCC OnLine Del 8419].*

117 *Mcdermott International Inc. v. Burn Standard Co. Ltd., (2006), [(2006) 11 SCC 181].*

118 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

119 *Deepak Kumar &Ors. v. Manoj Gupta, (2009), [2019 SCC OnLine Del 8419].*

120 *Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.*

'Patent illegality', when defined narrowly is a desirable tool in the hands of a Court exercising jurisdiction under Section 34 of the Act. Courts are now tasked with ensuring that this tool is used to protect fairness and justice without compromising the objectives of the 2015 Amendment Act and without violating express provisions thereof.

Today we stand at a point where despite the Law Commission expressly rejecting the expansive approach adopted towards understanding 'public policy of India' in *Western Geco.*[121] and *Associate Builders*,[122] the law as stated in *Associate Builders*[123] has been substantively reinforced. The path to expand the terms used in the 2015 Amendment Act and to re-introduce the grounds of challenge that the Law Commission sought to remove is open. It is for the Courts to define the terms in the context of the objective of the 2015 Amendment Act, without compromising with fairness and justice and to arrive at an appropriate balance between the said goals. In this regard, we may learn from international jurisprudence, the approach to 'public policy'.

Public Policy as a ground for setting aside arbitral awards: An International Analysis

The concept of public policy has been treated as sacrosanct by States and their formal judicial systems as it provides them a last resort to protect intrinsic interests and leave untouched specific national taboos, while enforcing arbitral awards. While typically, and especially in developed, arbitration-friendly jurisdictions, the use of public policy to bar recognition and enforcement of arbitral awards is lesser, the inherent unpredictability of its usage, while enforcing arbitral awards, across jurisdictions has made it worth considerable discussion in legal writings.[124] A mere misapplication of mandatory rules and public law rules of the applicable law has not been perceived to be sufficient to invoke the exception of public policy. Broadly, principles of procedural and substantive public policy have been recognized by Courts, while testing the enforceability of an arbitral award.

The fear of the application of this exception increases when enforcement of an award is to be done by national Courts that are not as well-versed and experienced in the application of the Convention.[125] In anticipation of such difficulties, some States have already acted in a manner that limits the possibility of a wide usage of this exception, in enforcement of arbitral awards, either by changing the law, or by issuing internal directions to the Courts. The treatment of the exception by various legal systems and its application by the Courts will be examined now.

United States

Historically, the Courts in the United States of America have taken a conservative approach while interfering with awards borne out of international arbitration, especially on the

121 *ONGC Ltd. v. Western Geco International Ltd., (2014), [(2014) 9 SCC 263].*

122 *Id.*

123 *Id.*

124 Karl Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, 11th IBA International Arbitration Day and United Nations New York Convention Day "The New York Convention: 50 Years", (2008).

125 *Id.*

ground of 'public policy'. Such an aversion to interference with arbitral awards is made crystal clear in these following words of the US Supreme Court – "*The invalidation of such an agreement in the case before us would reflect a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.*[126]

Another case highlighting the pro-arbitration attitude of the United States is the *American Construction Machinery & Equipment Corporation Ltd. v. Mechanised Construction of Pakistan Ltd.*,[127] where the arbitral award rendered was upheld with the observation that the American public policy itself would be violated if the foreign arbitral award was not enforced. In fact, that a general pro-enforcement bias is present in the New York Convention was highlighted in the case of *Parsons &Whittemore Overseas Co., Inc. v. Société Générale De L'industrie Du Papier*,[128] where the scope of the 'public policy' exception was narrowed, and it was held that a Court may only refuse to enforce a foreign arbitral award under the public policy defence "*where enforcement would violate the forum state's most basic notions of morality and justice*." In this case, in fact, it was noted that an expansive construction of this exception would vitiate the New York Convention's basic effort to remove obstacles to enforcement. Such a high threshold for invoking the defense of public policy was motivated by earlier precedents, reflecting a similar aversion to interfere with arbitral awards.[129] This is an attitude that has carried forward, as can be appreciated from a perusal of subsequent judicial pronouncements on the issue.[130]

Hence, it is clear that in the US, at least, promotion of international arbitration and international business relations consistently outweighs 'public policy concerns' during the enforcement of foreign Arbitral Awards.

United Kingdom

Sections 67-69 of the English Arbitration Act, 1996 govern the law regarding challenge to arbitral awards in England. 'Public policy', as a ground for challenging arbitral awards is explicitly mentioned in Section 68(2)(g) of the Act of 1996. 'Fraud', interestingly, finds an explicit mention in this provision, and is seen as a separate ground for challenging an arbitral award. 'Public policy' has been understood in a broad manner to include 'fundamental conceptions of morality and justice'[131]. Thus, public policy as a defence for nulling arbitral awards is used extremely cautiously, to maintain the desired finality of arbitral awards.[132] Grounds like bribery[133] *etc*. are at most used by English Courts, to set aside arbitral awards, with the Courts generally being reluctant about considering a

126 *Scherk v. Alberto-Culver Co., (1974), [417 U.S. 506 (1974)].*

127 *American Construction Machinery & Equipment Corporation Ltd. v. Mechanised Construction of Pakistan Ltd, (1987), [659 F. Supp. 426 (S.D.N.Y. 1987)].*

128 *Parsons &Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, (1974), [508 F.2d 969, 974 (2d Cir. 1974)].*

129 *In re Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.,(1984), [737 F2d 150 (2d Cir. 1984)].*

130 *Telenor Mobile Communications v. Storm LLC, (2009), [No.07-4974 (2d Cir. 2009)].*

131 *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd., (1999), [[1999] HKCFA 40].*

132 *DST v. Rakoil, (1987), [1987] [2 Llod's Rep. 246].*

133 *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd., (1999), [[1999] Q.B. 740].*

'public policy' objection *de novo,* where the arbitrators have already addressed the topic and concluded that there was no violation.[134] Similarly, other decisions of the English Courts have also affirmed that the Courts should not interfere with an Arbitral Tribunal's decision on the grounds of 'fraud' or 'public policy' violation, save in very exceptional circumstances.[135]

Such is the threshold of 'public policy' for setting aside arbitral awards that it has been remarked by scholars in the field that till date no arbitral award has been set aside by an English court on the basis of public policy under Section 68(2)(g) of the 1996 Act, notwithstanding the extremely high number of arbitral awards rendered in London each year.[136]

France

Due to its important effect on French law, a glimpse of the jurisprudence of the European Court of Justice, with respect to enforcement of arbitral awards is needed, before proceeding to such examination of French law. The case of *Eco Swiss Chine Time Ltd. v. Benetton International N.V*.[137] is a seminal example of a pro-arbitration European attitude. In the context of setting aside the arbitral award, it was held in this case that, "*it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.*"[138] The European stance on the use of the 'public policy' exception in the enforcement of arbitral awards finds perfect reflection in these following words, '*The recourse to public policy is only justified where the non-conformity with basic principles of morality and justice … is evident*.'[139]

In the French context, specifically, it is Article 1502 of the French Code of Civil Procedure ('NCPC') that provides an exhaustive list of grounds for the annulment of an international arbitral award, during judicial review. Article 1502(5) makes the stance on 'public policy' clear, when it states that an international arbitral award shall be set aside if its recognition is '*contrary to public international order*'. However, the position differs slightly, when it comes to the issue of enforcement of domestic arbitral awards in France. In that context, the concept of 'public policy' is very broad, encompassing all mandatory provisions of French law.[140]

In France, as in other member states of the European Union, then, a test similar to the one laid down in *Parsons &Whittemore*[141] is observed to be applied, when dealing with the question of the 'public policy' exception to the enforcement of foreign arbitral awards.[142] The conservative approach of the French in interpreting the 'public policy'

134 *Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd., (1999), [[1999] Q.B. 740].*

135 *National Iranian Oil Co. v. Crescent Petroleum Co., (2016), [[2016] EWHC 510 (Comm)].*

136 Koepp et al., *An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings'*, Journal of International Arbitration, (2018).

137 *Eco Swiss Chine Time Ltd. v. Benetton International N.V., (1999), [Case C-126/97, Eco Swiss, 1999 E.C.R. I-3055].*

138 *Eco Swiss Chine Time Ltd. v. Benetton International N.V., (1999), [Case C-126/97, Eco Swiss, 1999 E.C.R. I-3055].*

139 Peter F. Sschosser, *Arbitration and European Public Policy'*, L' Arbitrageet le Droit Européen (1997).

140 *Supra 145.*

141 *Parsons &Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, (1974), [508 F.2d 969, 974 (2d Cir. 1974)].*

142 Cour de Cassation 19.11.1991, Société des Grands Moulins de Strasbourg c/ Société Compagnie Continentale

exception is witnessed in the case of *Thalès v. Euromissile*[143] where an attempt to prevent the enforcement of a foreign arbitral award on the ground of 'public policy' was refuted, with reference being made to the *Eco Swiss China* case and an ultimate observation that the 'public policy' exception could be invoked only where the enforcement of a foreign arbitral award ran contrary to the French legal order, or entailed the violation of a fundamental rule of law. Further, this case embellished the belief that a review on the merits of the award could happen only where the award was vitiated by fraud. This position has stood the test of time, and such a strict threshold for vitiation of foreign arbitral awards finds itself as good law in France.[144]

Germany

The German Code of Civil Procedure also establishes an exhaustive list of grounds for annulment of a foreign arbitral award. As per Section 1059(2)(b), an arbitral award may be set aside by the Court if it finds that its recognition or enforcement would lead to a result '*contrary to public order*'.

While enforcement of arbitral awards in Germany marks a distinction between foreign arbitral awards, *ordre public international*, and the much stricter and higher threshold of *ordre public interne*, applicable to domestic arbitral awards, no such distinction has been found when it comes to annulment proceedings, where infringement of substantive public policy is the only ground for annulment.[145] Substantive public policy in Germany encompasses (1) mandatory rules serving essential public interests; (2) fundamental principles like the principles of *pacta sunt servanda*, good faith etc., and (3) good morals.[146]

Even with respect to mandatory rules, not every infringement is tantamount to public policy violation. Only when enforcement of the award leads to a result 'obviously' incompatible with fundamental principles of German law would *ordre public* be concerned.[147] Hence, as in France, even in Germany, the public policy exception is interpreted very narrowly, only to set aside awards running against mandatory rules pertaining to 'public policy', in order to ensure that this exception is not used as a tool to challenge unfavourable awards, rendering arbitration as an alternate dispute resolution method otiose.[148]

Conclusion

'Public policy' through an international lens offers India a variety of insights about the judicial applicability of 'public policy' to assail arbitral awards. Ours is a nation that is on

France, Rev. de l'Arb. 1992.

143 *Thalès v. Euromissile, (1992), [J.D.I. 357 (2005)].*

144 P. Heitzmann & J. Grierson, 'SNF v. CYTEC Industrie: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC", 2 Stockholm Int'l Arb. Rev. 39 (2007); B Hanotiau and O Caprasse, '*Arbitrability, Due Process and Public Policy Under Article V of the New York Convention',* Journal of International Arbitration, (2008) Vol. 25(6).

145 *Supra 145.*

146 *Supra 133.*

147 Federal Court of Justice, judgment of 30 Octo. 2008, III ZB 17/08; Federal Court of Justice, judgment of 28 Jan. 2014, III ZB 40/13; Federal Court of Justice, Judgment of 16 Dec. 2015, I ZB 109/14.

148 Higher Regional Court of Hamburg, Judgment of 14 May 1999, 1 Sch 2/99; Higher Regional Court of Jena, Judgment of 8 Aug. 2007, Az 4 Sch 03/06.

the brink of being an economic superpower. While it is important to protect independent rights of parties to an arbitration, it must also be understood that arbitration, above all else, was envisaged as a tool for effective and quick dispute resolution, especially in commercial matters.

Belying arbitral awards through a nebulous term like 'public policy' was to be resorted to only when abhorrent violation of judicial norms presented itself in an arbitral award. The Court was never meant to re-appreciate and allow room for re-argument of an entire *lis*, which has already been decided upon by an Arbitrator, agreed upon by the parties to the arbitration themselves. Availability of such an easy challenge to arbitral awards, by the mere utilization of the term 'public policy' would render the entire arbitration ecosystem otiose, and defeat the very purpose of both, the Arbitration Act and the New York Convention.

While it is important for Courts, the body *politik* and the legislature to actively engage in evolving and transforming, according to the needs of the age, a vibrant public policy, Courts must understand, especially looking at the foreign experience, in this regard, that the threshold for judicial challenge must be the highest and such challenges should be viewed through a very narrow compass. The endeavour is not to set aside the award, but to first see if it can be given a means to function. While *mala fides*, bribery, corruption and the likes are certainly grounds that an affected party may raise before a Court, re-appreciation of the merits, under the said garb is to be guarded against.

Various European Courts have looked at public policy through an international and transnational perspective. Respect has been given to the international usages of the term, and an attempt has been made to create an over-arching set of values and principles that are said to guide the 'public policy considerations' of the entire world – a dove tailing *jus cogens*.

While every nation's innate set of values and outlook to public policy is critical to State sovereignty, at an international level, acceptance, implementation and judicial acknowledgement of the over-arching transnational values, while looking at cases through the lens of 'public policy' is required in today's day and age, especially when we find our country at the crossroads of large international, commercial transactions, keeping in mind India's ambition to be a dominant economic player.

Public policy is a *Brahmastra* to be preserved, but seldom to be used.

JUSTICE (RETD.) A.K. SIKRI

Former Judge, Supreme Court of India

Justice Sikri was born on 7th March, 1954. He had an excellent academic record. He stood third in the merit list in Higher Secondary from CBSE, Delhi. Did his B.Com(Hons.) from Shriram College of Commerce, Delhi University in the year 1974 and LL.B from Law Faculty, Delhi University in the year 1977. Justice Sikri was awarded Gold Medal for attaining first position in LL.B and awarded special prize for getting highest marks in Constitutional Law I & II. He holds the distinction of securing first position in all six semesters of LL.B and getting all possible prizes and medals of Delhi University for LL.B course. He did his LL.M from Delhi University and got first position in three years course. Won medals and prizes in various extra-curricular activities. Justice Sikri was the president of Campus Law Centre, Delhi University in 1976-77. Was also member of Academic Council of Delhi University in the year 1976-77 and various committees of Delhi University. During his schooling from 9th standard onwards till LL.M., he was given scholarships each year.

Justice Sikri enrolled as an Advocate in July, 1977 with Bar Council of Delhi and started practicing in Delhi. He conducted cases of all types with specialization in Constitutional cases, Labour – Service Matters and Arbitration Matters. He was counsel for numerous Public Sector Undertakings, Educational Institutions, Banks & Financial Institutions and various Private Sector Corporations. Justice Sikri was also part-time lecturer in Campus Law Centre, Delhi University (1984-89). He was Vice-President, Delhi High Court Bar Association during 1994-95 and was member of the Governing Body of various colleges from time to time. He was designated as Senior Advocate by Delhi High Court on 30th September, 1997.

Justice Sikri was appointed as Additional Judge of High Court of Delhi w.e.f. 7th July, 1999 and permanent Judge on 23rd April, 2001. Justice Sikri became the Acting Chief Justice of Delhi High Court w.e.f. 10th October, 2011 and was elevated as the Chief Justice of Punjab and Haryana High Court w.e.f. 23.9.2012. He authored/delivered various landmark judgments during his tenure as judge of Supreme Court of India, Delhi High Court & Punjab and Haryana High Court till his superannuation.

Justice Sikri was chosen as one of the 50 most influential persons in Intellectual Property in the world in the survey conducted by Managing Intellectual Property Association (MIPA) for the year 2007.

Justice Sikri has the honor to adorn the seat of International Judge in the Singapore International Commercial Court, which he currently holds.

Breach of Arbitration Agreement: Whether A ground for Claiming Damages

-Justice (Retd.) A.K. Sikri

Introduction

Arbitration, as a mode of alternative dispute resolution, has been prevalent for centuries. For resolving certain kinds of disputes, including commercial disputes, it is a preferred choice of the parties for varied reasons. Since an agreement between the parties to settle the disputes, when they arise, is a sine qua non of arbitration proceedings, generally such agreements are entered into between the parties at the threshold, viz., at the time of entering into contractual relationship. There may also be circumstances when there is no such arbitration agreement earlier, and the parties agree for resolution of disputes through arbitration means on the eruption of disputes. The arbitration works on three basic principles, which are:

1. Fair resolution of disputes by an impartial tribunal without unnecessary delay or expenses;
2) Party autonomy to resolve their disputes subject only to such safeguards as are necessary in the public interest;
3) Minimal judicial intervention except what is provided in the statute.

These principles are specifically embodied in the English Arbitration Act, 1996, and widely recognised in the Indian Arbitration & Conciliation Act, 1996 (the Act)[1]. The aforesaid principles are

1 For detailed discussion on this aspect, see: The Law and Practice of Arbitration and Conciliation by Justice Indu Malhotra.

sought to be achieved by casting general duty on the arbitral tribunals, on the parties to the dispute as well as on the courts. As far as the Arbitral Tribunal is concerned, such a general duty can be found in Section 33 of the Act. The purpose behind this provision is to tell the Arbitral Tribunal it's duty to assure the parties of fair trial by an impartial tribunal while choosing the arbitral procedure. This provision incorporates the spirit of Articles 18 and 19 of the UNCITRAL model law which have been described as the Magna Carta of the arbitration procedure. Likewise, the duty fastened on the parties can be traced to Section 40 of the Act. This provision enjoins upon the parties to do 'all things necessary' with the objective of achieving the proper and expeditious conduct of proceedings. The parties are, therefore, required to perform this duty for speedy resolution of the disputes. It would include the obligation to take recourse to arbitration process and resolve the dispute through arbitration means, and not to deviate therefrom or scuttle this process.

Notwithstanding the aforesaid ethos of the arbitral process, more so when the parties themselves voluntarily agree to take recourse to arbitration for adjudication of disputes, it is seen that on many occasions, one or the other party tries to create roadblocks in the smooth functioning of the arbitration proceedings or try to wriggle out of it. This can be done by adopting various methods. One of the modes is to file anti-arbitration injunction and anti-suit injunctions, particularly in international commercial arbitrations. There may be situations where such a move on the part of a party is on valid and justified grounds. However, when the move is just to delay the proceedings, or an attempt to thwart the proceedings and is ultimately found to be misconceived and unwarranted, the question of consequences of such a move would inevitably arise. No doubt, whenever a particular action is taken by one party in the teeth of an arbitration agreement to stall the arbitration proceedings, and if it turns out to be a wrong move, it would amount to breach of an arbitration agreement. One remedy for breach of arbitration agreement is specific performance. Whether for such breach on the part of defaulting party leads to allowing other party to seek damages for such a breach? This is the focus of the present article in which the author shall be discussing as to how the legal position has emerged in certain jurisdiction, including in India.

Earlier Legal Position

Way back in the year 1942, the English Court of Appeal dealt with this issue in *Heyman v. Darwins Limited*[2]. The issue which arose in that case was as to what was the appropriate remedy for breach of an arbitration agreement. The Court answered by holding that since an arbitration clause can be specifically enforced, unlike an ordinary contract, the appropriate remedy for breach of such an agreement to arbitrate is its enforcement and not damages. The following observation of Lord Macmillan's speech in the said case captures the reason for laying down this principle:

> "I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause

2 [1942] A.C. 356

> does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both the parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. *And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts."*
>
> [emphasis supplied]

The Indian Supreme Court quoted with approval the aforesaid discussion from *Heyman* in the case of *M. Dayanand Reddy v. A. P. Industrial Infrastructure Corporation Limited*[3], as can be seen from the following discussion therefrom:

> "It is pertinent to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of contract results only in damages. The arbitration clause however can be specifically enforced by the machinery of the Arbitration Act. Moreover, there is a further significant difference between an ordinary agreement and an arbitration agreement. In an arbitration agreement, the Courts have discretionary power of dispensation of a valid arbitration agreement but the Courts have no such power of dispensation of other terms of contract entered between the parties."

Again, in *Branch Manager, Magma Leasing and Finance Ltd. v. Potluri Madhavilata*[4] the Supreme Court of India applied the decision in *Heyman v Darwins Ltd.* on the separability of the arbitration agreement and held that repudiation of the main contract does not affect the arbitration agreement. The decision also quotes the dictum of Lord Macmillan[5].

The dicta in *Heyman* case may be contrasted with another judgment of the Kings Bench rendered 30 years ago. That case was *Doleman & Sons v. Ossett Corp [1912] 3 KB 257 (CA)*. In that case, the plaintiffs brought an action against the defendants for sums which they alleged to have become due to them from the defendants under the contract, and for damages for wrongful termination of the contract by the defendants. The defendants did not apply for a stay of proceedings in the action under Section 4 of the Arbitration Act, 1889. Subsequent to the commencement of the action, the defendants' engineer, under the arbitration clause, without giving notice to the parties, and without the knowledge or

3 (1993) 3 SCC 137

4 (2009) 10 SCC 103

5 See para 15 of the judgment

consent of the plaintiffs, made an award purporting to decide the matters which were the subject of the action. It was held, by a majority, that it was not competent for the engineer to determine the matters in question, pending the action, and that therefore his award was not a bar to the plaintiffs' claim in the action.

Fletcher Moulton LJ said (obiter) that where there is a breach of the arbitration agreement, a party may bring a claim for damages for breach of contract and may also apply for stay. In his words:

> "Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a Court of law to enforce his rights under the contract. The answer which the Courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the Courts of law could be valid, but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the Courts. In other words they decided that the jurisdiction of the Courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under such a submission. Neither a general agreement to submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitrator, nor even the pendency of an arbitration thereon, could be pleaded in answer to a claim in an action.
>
> *In thus deciding they did not nullify the effect of arbitration clauses. On the contrary they held that, if in breach of such a clause one of the parties brought an action, the other could sue him in contract for the breach, and recover such damages as a jury might award. It will be evident, however, that the remedy in damages must be an ineffective remedy in cases where the arbitration had not been actually entered into, for it would seem difficult to prove any damages other than nominal. In the case of an arbitration pending, which was rendered abortive by the action, substantial damages might perhaps be proved, because it would be open to the jury to give damages commensurate with the costs to which the plaintiff had been uselessly put in the arbitration.*
>
> ...
>
> *... so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and that the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of s. 4 of the Arbitration Act, 1889, but if he neglects so to do, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute."*

In the following year, the same judge (as Lord Moulton) elaborated on the historical position, in *Bristol Corporation v. John Aird & Co*[6] in the following manner:

> "Submissions to arbitration have ... been more and more respected by the Legislature, and by the Courts in administering the legislation relating to them, during the last sixty years. The great step which gave to them their present status was taken in the Common Law Procedure Act, 1854. Up to that time a man could repudiate a submission to arbitration, even if the arbitration was pending, and he could refuse to go to arbitration, no matter how plainly he had contracted so to do, the only remedy for his breach of contract being an action for damages, which of course was an action that was utterly ineffective, since no damages could be proved in such a case. But after the Common Law Procedure Act, 1854, matters were in a very different position. The Legislature enabled these submissions to arbitration to be made the subject of indirect decrees of specific performance. A man was not deprived of his right to come to the Court and bring his disputes there, but the Court was invested with a discretion to refuse to him its assistance, if he had contractually bound himself to go to a domestic tribunal and nothing had happened which would make it unjust for the Court to insist on his keeping the bargain. In this way the right to come to the Court was preserved, while at the same time men could be forced to keep contracts which they had made as to the tribunal which should settle disputes, which contracts were in the eyes of the business world an important part of the total contract entered into between the parties."

At the same time, it was also remarked that it would be difficult to prove any damages other than nominal. However, in the same width, it was also observed that in case of a pending arbitration which was rendered abortive by the action, it was possible to substantial damages. These substantial damages were equated with the costs which the plaintiff had been uselessly putting in the arbitration.

Dicta of these judgments can be traced to the two judgments of Indian High Courts. First case is *Bhowanidas Ramgobind v. Pannachand Luchmipat*[7]. In that case, the main question was whether the party applying for a stay under the Arbitration Act 1899 had disentitled himself from obtaining a stay of court proceedings by taking a step in the proceedings. The Court observed:

> "... Notwithstanding such an agreement at Common Law the parties or any of them are at liberty to invoke the assistance of the Court to settle the controversy which has arisen, and the Court is bound to entertain the suit. The only remedy at Common Law open to a party to the agreement is to seek damages for the breach of the agreement to refer the matter to arbitration. But this remedy would usually be found to be nugatory for under the circumstances the plaintiff would not be able to prove more than nominal damages ..."

6 [1913] AC 241, 256-257

7 (1925) ILR 52 Cal 453

So also in *In re All India Groundnut Syndicate Ltd.*[8], which involved an application for a stay under the Arbitration Act 1940, the Bombay High Court referred to *Doleman v. Ossett Corp* and said, of the common law rule:

> "... It may be that the party commencing the suit does so in breach of his agreement to refer the dispute to arbitration, and that the other party might have damages out of him for that breach, but the Court would not specifically enforce that agreement by refusing to exercise its jurisdiction ..."

Whereas on the one hand Heyman case, which has been referred to in two Supreme Court judgments gives an impression that if there is a breach of arbitration agreement, the appropriate course of action is to see specific enforcement of the arbitration clause and the appropriate remedy for such a breach is not damages, on the other hand, Doleman & Sons holds that if any breach of such a clause, one of the parties brought an action, the other could sue him in contract of breach and recovery of damages. Thus, there appears to be some contradiction in the two approaches. Where does it lead to? Can it be said with certainty that damages can be claimed for breach of arbitration agreement?

I would like to answer these questions by referring to developments that have taken place in recent years. Let us start with the legal position in international arbitration, which can be taken as firmly settled.

Position in International Arbitration Law

With the enormous growth of international litigation in the last 50 years, it has become common for parties to seek to avoid agreements providing for arbitration in one country (or for the exclusive jurisdiction of the courts of one country), by suing in the courts of another country for tactical or other reasons. These are known as "anti-arbitration injunctions" or "anti-suit injunctions". The plaintiff prays for issuance of an order by the court in one State to injunct a party from initiating or continuing with the arbitration proceedings taking place in another State. Obviously, the grant of an anti-arbitration injunction pre-empts initiation of an arbitration proceeding or disrupts an ongoing proceeding. Jurisprudence has developed, which is virtually recognised by all the jurisdictions, stating the grounds on which such injunctive orders can be granted. That discussion is eschewed here, as the same is not necessary. It may, however, be mentioned that the grant of injunctive orders lies in the discretionary regime of the Court. At times, doctrine of *kompetenz-kompetenz* is invoked by the courts as per which the courts can direct the parties to approach the Arbitral Tribunal to determine on its own jurisdiction when challenged by one of the parties. However, when such proceedings are ultimately found to be untenable and frivolous, indulging in such a move by a party is treated as committing the breach of arbitration agreement. Even in respect of domestic arbitrations, means can be adopted to delay or derail the arbitration process on the ground of non-existence or validity of arbitration agreement or on the ground of non-availability of the disputes, etc. If such an action is found to be untenable, it can also be termed as breach of arbitration agreement.

8 1944 SCC Online Bom 127

In such cases, the party relying on the arbitration agreement has following three main options:

1) The first is to apply for a stay of proceedings in the foreign court. That may be an ineffective remedy, especially if the procedures in the foreign court are slow or otherwise unreliable.

2) The second option is to apply for an injunction from the Courts at the seat of the arbitration, but this may be ineffective if the opposing party is not subject to the personal jurisdiction of the Courts of the seat.

3) The third option (and relatively rare option) is a claim for damages for breach of exclusive jurisdiction clauses and arbitration agreements. It will be pertinent to mention that English Courts have now succinctly recognised this since *Mantovani v Carapelli*[9] (an exclusive jurisdiction clause case), viz., in international cases a remedy for damage caused by bringing proceedings in a foreign country in breach of an agreement providing for the exclusive jurisdiction of the English Courts or for arbitration in England. The legal position is lucidly stated by Dicey, Morris & Collins in their book, *Conflict of Laws,* 15th ed 2012, (paras 12-164 & 12-165, n 712) as under:

> "Damages for breach of jurisdiction agreements
>
> On the footing that an agreement on jurisdiction represents a contractual promise supported by consideration[10] and is not otherwise invalid as a source of legal obligation, the question arises whether a party who is the victim of a breach of that agreement may in principle maintain a claim[11] for damages for breach of contract.[12] One argument may be disposed of at the outset: it is plainly no answer to a claim for damages for breach of contract that a court declined to grant specific or other procedural relief[13] to the victim of the breach. The decision of a court to refuse to enforce a contract by injunction or decree of specific performance does not entail a conclusion that there is no breach.[14] Damages for breach of contract are a common law right, at least where the contract is governed by English law.[15]

9 [1980] 1 Lloyd's Rep 375

10 If the contract is governed by English law this will be required. It is not necessarily required if the contract is governed by foreign law.

11 11 Or, if the English court exceptionally refuses a stay of proceedings brought in breach of contract, a counterclaim. In *Incitec Lid v Alkimos Shipping Corp (2004) 206 A.LR. 588 (Fed Ct)* it was suggested that instead of a counterclaim, the breach of contract could be reflected in the costs order made. Whether a counterclaim may be made in the substantive proceedings will also depend in part on when the cause of action is deemed to have arisen.

12 Briggs and Rees, para.5.57 et seq; Briggs (2001) 72 B.Y.B.I.L. 446. See also *Tan and Yeo [2003] L.M.C.L.Q.435; Tham (2004) L.M.C.L.Q. 46* (who argues that a distinction is to be drawn between arbitration and jurisdiction clauses, and that the basis for a claim may be found to lie more easily in tort, on the footing that there was wrongful interference with a contract, or a wrong equivalent to abuse of the process of the foreign court). See further for an analysis based on tortious interference with contractual rights, *The Kallang [2008] EWHC 2761 (Comm.), [2009] 1 Lloyd's Rep. 124; The Duden [2008] EWHC 2762 (Comm.), [2009] 1 Lloyd's Rep. 145.* For the position in the United States, see *Tan (2005) 40 Tex. Int. L.J. 623.*

13 Such as a stay of proceedings.

14 *Incitec Ltd v Alkimos Shipping Corp* (2004) 206 A.L.R. 588 (Fed Ct).

15 If the law governing the agreement on jurisdiction does not consider that damages are available for its breach, or (if the argument is advanced as in tort) if the *lex delicti* does not allow damages, an English court cannot make any

> Surprisingly, perhaps, there was little judicial authority[16] on the subject until 2001, when the Court of Appeal approved, in principle at least, the proposition that damages could be obtained in an action for breach of contract.[17] The ruling was a narrow one: the defendant had brought proceedings before an American Court; the American Court had dismissed them on jurisdictional grounds; it had made no order for costs because it lacked the procedural power to make such an order, and the claimant sought only to recover in damages only the loss represented by the expense it had incurred in defeating the proceedings wrongly brought in America on jurisdictional grounds. Since then, the principle has been accepted as correct by the House of Lords.[18] But there has been no clear decision[19] about the degree to which the principle may be extended, especially in cases in which the claimant has been unsuccessful in contesting the jurisdiction of the foreign court. The rules on res judicata, as well as considerations of public policy, will need to be examined carefully in order to prevent avoidable satellite litigation, but the principle that a civil wrong sounds in damages is fundamental to the common law. For while it is objectionable to allow litigation to undermine a foreign judgment, a party who has breached his contract has no proper expectation of being allowed to profit from his wrong; and a victim who chooses to defend a claim in proceedings wrongly brought before a foreign court could also be seen to be mitigating his loss. Proof and quantification of loss may not be straightforward, but English law provides that a breach of contract, or a tort, sounds in damages; and it is difficult see the principled basis for refusing damages in this area of contractual breach or wrongful interference with contracts.[20]

Following are some of the takes from the legal positions in U.K., or for that matter, in international arbitration regime:

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such award.

16 In *The Lisboa* (1980) 2 Lloyd's Rep. 546, 552 (CA) Dunn L.J. accepted that there was a remedy in damages, by analogy with damages for breach of an arbitration agreement (on which see, e.g. *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep. 375 (CA); *The Eastern Trader* [1996] 2 Lloyd's Rep. 585). See Collins, Essays, pp.71-72.

17 *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755, [2002] I W.L.R. 1517.

18 *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep. 425. But the acceptance was of a concession made by counsel in argument, and the point did not require to be ruled on.

19 *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm.) followed *Union Discount,* but does not go any further towards elucidating the principle. Union Discount was applied at first instance in *A/S D/S Svendborg v Akar* [2003] EWHC 797 (Comm.), and in *National Westminster Bank Plc v Rabobank Nederland* [2007] EWHC 1056 (Comm.): in National Westminster Bank Plc v Rabobank Nederland [2007] EWHC 1742 (Comm.) the court assessed damages be reference to an award of costs on the indemnity basis. The court appears to have regarded a claim as properly pleadable in U*nderwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2008] EWHC 1842 (Comm.), [2009] Lloyd's Rep. I.R. 365. The principle was approved in *Sunrock Aircraft Corp Ltd v SAS Denmark-Norway-Sweden* [2007] EWCA Civ 882, [2007] 2 Lloyd's Rep. 612, and was referred to without discussion in C v D [2007] EWCA Civ 1282, [2008] Bus. L.R. 843. See also Takahashi (2008) 10 Yb.P.I.L. 57. For damages for breach of an agreement to arbitrate, see *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm.), [2009] 1 Lloyd's Rep. 213 (doubted, but not on this point: *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep. 193).

20 For damages to be recoverable for breach of a choice of law agreement, it would first be necessary to find that the expression of a choice of law was or embodied a promissory obligation. In *Ace Insurance Ltd v. Moose Enterprise Pty Ltd [2009] NSWSC 724* the court was sceptical as to the possibility.

(a) Damages can be awarded for breach of arbitration agreement based on common law;

(b) At least after 2001 onwards, English courts have taken definite view that damages can be awarded;

(c) There is no clear decision about degree to which the principle can be extended;

(d) Proof and quantification of loss may not be straightforward. However, English law provides that a breach of a contract or a tort, results in damages.

Another significant takeaway is that whether damages will be an effective remedy will depend on which tribunal awards it, and whether its award will be complied with or enforced. In *Schiffahrtsgesellschaft Detlef Von Appen GmbH v. Wiener Allianz Versicherungs AG (The Jay Bola)*[21] Hobhouse LJ said that in international cases an anti-suit injunction would be the primary remedy for breach of an arbitration agreement. This was, he said, "a simple example of an injunction to restrain a continuing breach of contract, as is the parallel remedy of an injunction to restrain foreign proceedings in breach of an exclusive jurisdiction clause." Significantly, he also added, echoing the earlier authorities and citing *Doleman v Ossett Corp:* "The aggrieved party also has the option to sue for damages for breach of contract though this is rarely a satisfactory remedy ..."

Other cases in which the damages remedy for breach of an arbitration agreement was recognised include *A v B* (No 2)[22] (proceedings brought in England in breach of agreement for Swiss arbitration); *National Navigation Co v. Endesa Generaçion SA*[23] (remedy recognised but barred by decision of Spanish court).

Ratio of M. Dayanand Reddy and Potluri Madhavilata

It is already mentioned that the Supreme Court of India, in *M. Dayanand Reddy* as well as *Potluri Madhavilata* have quoted with approval judgment of UK Court in *Heyman* and given an observation that appropriate remedy for breach of agreement to arbitrate is not damages but it is enforcement. Whether such observations amount to laying down the principle of law that damages for breach of arbitration agreement cannot be awarded at all? A deeper scrutiny into the Indian case laws cited should provide an answer. First feature which needs to be noted is that the two cases were in the field of domestic arbitration. Even in that context, we need to understand the ratio of these cases. It may be mentioned that the issue involved in *M. Dayanand Reddy,* was altogether different, viz., whether an arbitration agreement had been included in a contract by mistake. While discussing this aspect, in *M. Dayanand Reddy,* the Indian Supreme Court had referred to the passage from *Heyman v Darwins Ltd.* The entire passage reproduced also included the observation that "the appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement." However, at the same time, it is pertinent to note that the issue as to whether damages is an appropriate remedy for breach of arbitration agreement was not before the Indian Supreme Court. Therefore, neither was this an issue nor is there any discussion thereon in the *M. Dayanand Reddy* case. Likewise, even in

21 [1997] 2 Lloyd's Rep 279, [1997] 2 CLC 993, 999 (CL-15)

22 [2007] EWHC 54 (Comm), [2007] 1 Lloyd's Rep 358 (CL-23)

23 [2009] EWCA Civ 1397, [2009] 2 CLC 1004 (CL-16)

Branch Manager, Magma Leasing and Finance Ltd, there was no issue about admissibility of damages as a remedy in case of breach of an arbitration agreement. Therefore, it can be said that in the two judgments, the Supreme Court did not take a definite view that for breach of arbitration agreement, enforcement is the only remedy and damages could not be awarded.

I feel that the overall effect of these cases was that the Court recognised that there was in theory a remedy in damages but because a stay could be obtained under legislation giving effect to arbitration agreements, it was felt that the damages remedy was ineffective and nugatory. If a stay were granted, the applicant for a stay would be awarded costs. None of these cases suggests that there is no remedy in damages. On the contrary, all of them recognise the remedy in damages, but also recognise its practical limitations. Therefore, even in domestic arbitration, the issue of damages is still at large and it cannot be authoritatively said that damages for breach of agreement cannot be awarded.

Statutory Provisions in the Indian Act

With this, let me advert to the statutory scheme of the Act to find an answer. At the outset, it should be kept in mind that insofar as English law is concerned, it traces genesis for claiming damages for breach of contract from the common law principles. However, in the realm of damages, this common law principle cannot be applied having regard to specific provisions for claiming damages for breach of contract which are incorporated in Sections 73 and 74 of the Indian Contract Act. It has been held by the Indian Supreme Court that these provisions are the sole repository for the award of damages and neither English statutory law nor common law principles can be invoked. Therefore, one will have to look into the statutory provisions in Indian enactments to find the answer, particularly in the context of domestic arbitration.

In any case, the author feels that Indian Act to the conclusion that damages can be awarded for breach of an arbitration agreement. First, section 28 of the Indian Contract Act, 1872 provides:

Agreements in restraint of legal proceedings void. –

Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) Which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]

> Exception 1.- **Saving of contract to refer to arbitration dispute that may arise. -** This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable

in respect of the dispute so referred.

This incorporates an important principle, viz., that the right of a person to initiate legal proceedings by approaching the Court cannot be contracted out of and even if such an agreement is entered into, the same is declared void. It means that no-one can exclude himself or herself from the protection of courts by the contract. However, what is significant is that this rule is not absolute and is subject to three exceptions provided in the Section itself. The first exception above states plainly that contracts to refer disputes to arbitration are excluded. It means that the parties can agree not to approach the Court, but settle the dispute through arbitration. Such a contract is valid. This section accepts that arbitration is a valid mode of alternate dispute redressal mechanism. A fortiori, once an agreement is entered into for settling the disputes by arbitration, parties are bound to adhere to the mechanism of arbitration and are precluded from approaching the Court.

Second, this principle is recognised in Section 8 of the Indian Arbitration and Conciliation Act, 1996, which provides that if a suit is filed by one party in a Civil Court, even when there is an agreement to settle the disputes through arbitration, the Court shall not entertain the suit but refer the parties to arbitration.

Third, Section 5 of the Arbitration and Conciliation Act, 1996 lays down a fundamental principle that during the arbitration proceedings, the interference of the courts in the arbitral process should be minimal and only in the exceptional cases.

I am of the view that all these provisions support the principle that when there is an agreement for settling the dispute through arbitration, none of the parties may commit a breach of the agreement. It would, therefore, follow as a logical conclusion that since an arbitration agreement is a contract, if one party has committed breach of the agreement and the other party has suffered any loss/damages of such a breach, the affected party is entitled to claim damages. Damages can be awarded only as per the provisions of sections 73 and 74 of the Indian Contract Act. The English common Law on damages is not applicable as the Indian legislature has sought to cut across the web of rules and presumptions under the English common law by enacting uniform principles. As per section 73, only reasonably foreseeable loss that flows directly from the breach of an arbitration agreements is recoverable. Therefore, the Claimant cannot seek punitive or excessive damages.

To sum up, the legal position on damages for breach of arbitration can be stated as follows:

(1) Insofar as international arbitrations are concerned, the settled position is that damages can be claimed for breach of arbitration agreement.

(2) In respect of domestic arbitrations, answer can be the same, which can be culled out from the aforesaid statutory provisions as well as case law indicating that damages can also be one of the remedies. However, this proposition is yet to be tested in India.

JUSTICE (RETD.) M. JAGANNADHA RAO

Former Judge, Supreme Court of India

Justice Rao was born on 2nd December 1935. He Enrolled as an Advocate on 25th July, 1960 at Hyderabad and practised on the civil side, original and appellate at Hyderabad. Justice Rao glorified the essence of judiciary by taking the Constitutional Chair as a Judge of Andhra Pradesh High Court in 1982. Being impeccably tenacious towards his judicial duties took him a step further and engendered his elevation as the Chief Justice of Kerala High Court in 1991 & Chief Justice of Delhi High Court in 1994 and thereafter as a Judge of the Hon'ble Supreme Court of India in 1997 whence he retired on 1st December, 2000.

Post retirement, his vigor and fervor for work took him to the chairs of Vice-Chairman of 16th Law Commission of India and Chairman of 17th Law Commission of India from 2001-2003 & 2003-2006 respectively. Being an erudite judge with a brilliant legal acumen, he has enlightened many young professionals, academicians, students and others by his articles and speeches delivered at various platforms. Adding to it, several other chairs have been dignified by his appointment as a member of sub-committee of National Commission for review of Constitution of India on the question of incorporating new articles to Chapter III thereof; as a member of Academic Councils of the National Law Universities of Bangalore, Jodhpur, ILI New Delhi; as the Chairman of Academic Council of Army Institute of Law, Chandigarh; as the Chairman of the sub-committee of the Knowledge Commission dealing with legal education and have also been associated with the National Judicial Academy. Accentuation need to be made to the three reports submitted by him to the Hon'ble Supreme Court of India on amendments to the CPC, 1908 regarding the rules for ADR and Mediation which have been accepted by the Supreme Court in the benchmark case *of Salem Advocates Bar Associations vs. Union of India*: *2003 (1) SCC 49 : AIR 2003 SC 189.* Verily ineffable are his works and contribution to the institution of Judiciary and to the society at large.

Proof of Documents in Arbitration and Admissibility of hearsay Evidence

-Justice (Retd.) M. Jagannadha Rao

The question of proof of documents produced before an Arbitration Tribunal in India requires an in-depth study.

At the commencement of any arbitration, parties file affidavits of admissions and denials of documents filed by the opposite party. These objections generally fall into the following categories:

1) Documents admitted;
2) Documents whose genuineness or existence is denied;
3) Documents which are admitted but whose contents are not accepted unless proved;
4) Documents exchanged between the parties;
5) Documents by one party to a third party; and
6) Documents between two third parties.

So far as second category of documents whose genuineness or existence is denied, there is no doubt that the burden of proof is on the party who has filed the documents and that party has to prove the same by adducing oral or other evidence.

So far as the third, fourth and fifth categories of documents are concerned, the question is whether in order to prove the documents, the persons who had written the document or received the documents alone have to be called as a witness or whether any

other officer or employees of the company can say that the document has been sent or received in the regular course of business of the company and state that the contents of the documents are true and correct.

So far as the sixth category is concerned, question is whether the Tribunal can admit the same.

All these questions which arise in all arbitrations have to be answered by applying the provisions of Sec. 19 of the Arbitration and Conciliation Act, 1996.[1]

The first principle laid down in the Act is the one stated under sub-clause (1) of Sec. 19, that the "*Arbitral Tribunal shall not be bound by the Code of Civil Procedure or the Indian Evidence Act."*[2]

The second principle is stated in sub-clause (4) of Section 19 of the Act, that the power of Arbitral Tribunal to conduct proceedings includes the power to *"determine the admissibility, relevance, materiality and weight of any evidence."*[3]

Historical background of section 19

I may state that section 19 is based upon Article 19 of the UNCITRAL Model Law of 1985.[4] The said Article 19 of the Model Law is, in its turn, based upon the corresponding Articles of the UNCITRAL Rules of 1976 which were framed by a committee of jurists nominated by the United Nations. The said Committee consisted of jurists from common law countries and civil law countries. There were lot of discussions extending over a long period as to whether the strict principles of common law should be incorporated in the UNCITRAL Rules or whether the more liberal procedures of the civil law countries have to be adopted in regard to leading evidence before the Arbitral Tribunal.

Ultimately, a compromise was reached by the members of the Committee to adopt the more liberal scheme of civil countries for evidential procedure and not the strict rules of evidence of the common law countries.

On that basis it was specially provided in the UNCITRAL Rules that strict rules of evidence should not be applied for leading evidence in arbitration.

The said decision which was incorporated in the UNCITRAL Rules 1976 was carried into the Model Law of 1985, Article 19.

The Indian legislature copied the provisions of Article 19 of the Model law of 1985.

That is how, Sub-clause (1) of Section 19 came into being when it stated that the Arbitral Tribunal is not bound by the provisions of Code of Civil Procedure and the Evidence Act.

1 The Arbitration and Conciliation Act, 1996 Section 19.
2 The Arbitration And Conciliation Act, 1996 Section 19(1).
3 The Arbitration And Conciliation Act, 1996 Section 19(4).
4 UNCITRAL, Article 19.

The important result of the said provision is that the principles of exclusion of *hearsay evidence* are not applicable in arbitration proceedings and this has been emphasized unanimously by all jurist and there is no contrary view.

However, we find in practice, in most Indian arbitrations, strict principles of evidence are still being followed contrary to the mandate of the legislature.

As most of our lawyers and arbitrators have had experience of the court procedures, the tendency has been to apply court procedures by strictly adhering to the principles in the Evidence Act, practically ignoring the requirement of the statute.

The present article is therefore a humble attempt to explain the impact of Sec. 19 and the procedure that the Act intends lawyers and arbitrators, to follow.

We may also have notice that Part I applies to both international arbitrations in India and domestic arbitration between Indian parties in India. Therefore, the principles mentioned in Sec. 19 are applicable to both these arbitrations in India.

Effect of excluding strict rules of evidence contained in the Evidence Act and the position of hearsay evidence.

If indeed, the exclusion of strict rules of evidence is the mandate of Sec. 19(1) and consequently *hearsay evidence* is not excluded, then it follows that documents whose contents are denied or documents which are not between the same parties, will be admissible in evidence even if they are proved by a person who is not the author of the document or the recipient of the document. That is the immediate consequence of the exclusion of strict principle of evidence. In that context, the legislature has taken care to see that the Tribunal will have to consider whether to admit the document and if admitted, consider its relevance, materiality and weight. That is the safeguard imposed by the legislature in clause (4) of Sec.19.

It is therefore necessary to consider whether as a consequence of clause (1) of Sec. 19 *hearsay evidence* become admissible under the Act.

Legal position as to hearsay evidence in arbitration once Evidence Act is not to be applied

Originally, in common law countries, even in civil cases, hearsay was not admissible because the findings of fact had to be decided by the jury in U.K. It was well-known that the members of jury had no legal experience and for that reason, strict rules of evidence, excluding hearsay, were initially introduced.

But this exclusion of hearsay evidence has now become obsolete in U.K. Presently, the position in U.K. is that hearsay evidence is permitted in civil cases. Under Section 1 (1) of the Civil Evidence Act, 1995 of UK, it is expressly provided that "*In civil proceedings evidence shall not be excluded on the ground that it is hearsay.*" Section 1(2) defines

"Hearsay" as "*a statement made **otherwise than by a person** while giving oral evidence in the proceedings which is tendered as evidence of the matters stated".*[5] Section 2 of the said Act, 1995 only requires advance notice of a proposal to adduce hearsay evidence. However, the weight to be attached to the hearsay evidence is a matter for the court which has to weigh all the relevant circumstances.[6]

Paulson states as follows:

> "23.02 Any proof admissible in Court proceedings is accepted in arbitral proceeding. As is typical elsewhere with respect to commercial matters, documentary and testimonial proof is freely admitted as evidence. Arguments regarding the quality of proof tend to concern its credibility rather than its admissibility. Arbitrators following the continental system are thus largely unfettered by formal rules of evidence, and may evaluate, as they a see fit."[7]

In Paragraph 23.03 adverting to common law procedures it is stated that:

> "23.03 The **jury has almost entirely disappeared** in non-criminal proceedings in England. In the United States, it is frequently waived in commercial matters to avoid expense……..
>
> Another result of trial- by – jury tradition is existence of elaborate rules concerning the admissibility of evidence in court, designed to protect the trier of fact from the legerdemain of crafty lawyers. These exclusionary rules apply both as to documentary and testimonial proof. Particularly in the case of testimonial proof, such rules lead to elaborate rituals involving counsel and the court which most Civil law observers would be hard to follow (for example objections to **hearsay evidence,** to leading questions, to evidence which is not the "best evidence" and the like). **Such rules designed to keep untutored jurors from being led astray, have very small function in proceedings before sophisticated international arbitrators.**
>
> In the United States, it has been clearly established that **arbitrators need not slavishly apply rules of court to exclude evidence on technical grounds.** As Prof. Martin Domke has stated, Arbitral Proceedings are not constrained by formal rules of procedure or evidence.
>
> Thus, even where an arbitration follows the common law model, the procedure is more flexible and less formal than in court proceedings. Rulings by arbitrators on the admissibility of evidence are not ordinarily subject to review by the courts.

5 Civil Evidence Act, Section 1(1), 1995.

6 Civil Evidence Act, Section 1(2), 1995.

7 W.L. Craig, W.W. Park & J. Psuldon, International Chamber of Commerce Arbitration (3rd ed. 2000), ¶23.02.

Ruling on appeal based on the wrongful admission of **hearsay evidence** in arbitration, a Federal Court of Appeals in New York put it very well indeed:

> "The Arbitrators appears to have accepted **hearsay evidence as they were entitled to do.** If parties wish to rely on such technical objections, they should not include arbitration clause in their contracts *(Petroleum Separating Co. v. Inter-American Refining Co. 296 F.2d 124 (2d. Cir. 1962)"*[8]

I shall now refer to other leading text book writers who have pointed out this special feature of admissibility of hearsay evidence in arbitration proceedings.

1. Russel states as follows:

"Difficult doctrines like parol evidence or **hearsay rules** need not now concerned on Arbitral Tribunal unless, exceptionally, it is decided to apply strict rules of evidence in the arbitration".[9]

2. Craig states as follows:

"one of the complaints about English Arbitrators for many years has been about delay, and **the slavish application of the complex Rules of the Supreme Court -** when the parties have chosen to go to arbitration rather than to law, precisely in order to avoid just those things. **How many English Arbitrators, I wonder realize that they are not under any obligation to apply or follow the Rules of the Supreme Court.** All that the common law requires is to follow the ordinary rule of natural justice."[10]

3. Hunter states as follows:

"Whether they are from common law or civil law countries, they tend to focus on establishing the facts necessary for the determination of the issues between the parties, and are reluctant to be limited by technical rules of evidence that might prevent achieving this goal. *This is especially so where the rules in question were originally designed for use in **Jury trails,** centuries ago, at a time when many jurors were not able to read or write, so that it was necessary for documents to be read out allowed at hearings." (para 6.89 p.386)*[11]

*"It is essential for practitioners who have been raised in the common law tradition, to appreciate this and to learn **not** to place reliance on technical rules concerning the admissibility of evidence* during the course of proceedings

8 *Id* ¶23.03.

9 Francis Russell, Russell on Arbitration(23rd ed 2009), ¶4.078.

10 W.L. Craig, W.W. Park & J. Psuldon, International Chamber of Commerce Arbitration, 133-34 (3rd ed. 2000).

11 Nigel Blackaby, Constantine Partasides QC, Alan Redfern, and Martin Hunter, Redfern & Hunter on International Arbitration(5th ed.2009), ¶6.89.

particularly at witness hearings, (Para 6.90 p. 387).[12]

"Best evidence rules: "However, the main reason for the practice of international arbitral tribunal in relying primarily upon evidence contained in contemporary document is that the application of the so called 'best evidence rule', **applies primarily to the weight** of the evidence rather than to its admissibility and the evidence of contemporary documents will invariably be regarded as being of great weight. The authenticity of documents must be capable of proof if challenged by the other party, but it is not usually necessary to produce original documents, or certified copies unless there is some special reasons to call for the original. (Para 6.99.p. 389)'[13]

4. Wright in his article on the use of hearsay in arbitration states as follows:

*"Whether to admit **hearsay evidence** is one of the most common questions confronting **arbitrators.** As a general rule, I believe **that hearsay evidence should be admitted in an arbitration** hearing. This allows arbitrators to receive the complete picture of all relevant facts without encountering legal technicalities. It permits advocates- who are often untrained in the jurisprudence of evidence- to present a complete case to the arbitrator. It also forces arbitrators to deal with the underlying reliability and relevancy of each offered item of evidence. Many court and arbitrators recognise the fact that hearsay evidence helps the arbitrator establish a fair understanding of the facts and issue of the case. One arbitrator has stated: admission of hearsay is justified to keep arbitration from becoming too cumbersome through procedural wrangling, or by the requirement that every witness who might be brought in be required to appear."*[14]

"Technicalities limit the ability to present a proper and complete case in arbitration. Many advocates are unskilled in the intricacies of hearsay evidence. Even many lawyers are unable to determine whether an offered item is hearsay. By adopting a rule that all evidence is automatically admitted procedural complexities are eliminated. Non lawyer advocates are, thereby, allowed to offer any relevant evidence. Evidence that is inherently unreliable- as is much hearsay evidence- can be bolstered with additional direct or indirect evidence, forcing the arbitrator to review the weight of the evidence. Admitting hearsay evidence as a general rule allows and compels arbitrators to go through the relevance and reliability tests for each item of evidence. Often, hearsay evidence is declared inadmissible simply as a matter of law. A general rule which excludes hearsay evidence, however, may eliminate highly

12 *Id.*

13 *Id.*

14 James A. Wright, The use of Hearsay in Arbitration, http://naarb.org,proceedings/pdfs/1992-289 (last visited Jul 5, 2019).

relevant and reliable items of evidence. The mandatory

admission of hearsay evidence forces arbitrators to take the evidence home." Once the hearsay evidence is forced upon the arbitrator, an analysis of its relative worth must be made, and each item must be tested for its relevance and reliability. Admitting all hearsay evidence in arbitration requires analysis of the evidence on the part of the arbitrator. Under general principles, when any evidence is offered, two issues are presented: (1) the admissibility of the evidence and (2) the weight of the evidence. When an arbitrator excludes evidence merely because it is hearsay, no additional analysis is necessary. Admission of hearsay as an absolute rule, however; requires the arbitrator to explain why non-reliable hearsay evidence should be disregarded or why relevant and reliable hearsay evidence should be given weight. This forced exercise ensures that appropriate analysis is made with these concepts in mind, clearly hearsay evidence should be admitted into arbitration. An arbitrator should not rely on standard rules of legal admissibility, which allow the arbitrator to avoid the true evidentiary issue, i.e. how much weight the evidence should receive. When hearsay is offered, the most logical and appropriate response by the arbitrator is to recognize it as hearsay, with an admonishment to the parties that "it will be given weight commensurate with its relevance and reliability."[15]

Relevance and Reliability of Hearsay Evidence

As a general rule, relevance determines whether an offered item of evidence infers what is intended. Reliability, on the other hand, determines whether the offered item of evidence is worth inferring what is intended. Relevancy and reliability were used originally to develop the rule against admission of hearsay evidence. As common law courts excluded evidence which was either not relevant or not reliable hearsay evidence was generally considered irrelevant or unreliable. Therefore, common law courts determined that, instead of continually confronting the relevancy and reliability of hearsay evidence, such evidence should be automatically excluded. Under common law, therefore, hearsay evidence was admitted only under certain recognized exceptions. These recognized exceptions arose out of situations where the court found that even though the evidence was hearsay, it either was highly relevant or had a degree of reliability. For example, the residual exception specifically allows the admission of hearsay evidence which is sufficiently trustworthy, material, and relevant. Other exceptions support the notion that hearsay evidence should be admitted if it is reliable or relevant. For example, federal exception allows admission of an 'excited utterance'. According to FRE an excited utterance is: (A) statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition. The typical excited utterance is clearly an out-of-court statement and, if offered to prove the truth of the matter asserted, is hearsay. If the judge

15 *Id.*

finds that the statement offered was an excited utterance, it is automatically admitted if relevant. An excited utterance is considered reliable because the declarant did not have time to generate a false response. Because arbitrators do not and should not follow set procedural rules, the excited utterance should be admitted. The issue for the arbitrator is the weight to be given to the evidence. Recognized exceptions to the rule against the admission of hearsay may provide arbitrators with support for considering an offered item. In other words, if a recognized exception to the rule exists, the arbitrator can cite the exception as authority that the evidence may be reliable. However, the existence of the exception is not by itself enough to support a finding that the evidence should be given great consideration. The arbitrator should review the underlying reason for considering the evidence reliable."[16]

Thus, there is unanimity among all writers that hearsay evidence becomes admissible in arbitration proceedings once strict rules of evidence are discarded.

Section 19 (4):

Admissibility as a matter of procedure

The word 'admissibility' as a matter of procedure has to be distinguished from admissibility as a matter of substantive law. To latter refers to legal provisions like Sec. 35 of the Stamp Act or Sec. 49 of the Registration Act and other similar statutory provisions which deal with "admissibility" of documents as a matter of substantive law. But we are not concern here with those provisions of substantive law. We are here concerned with admissibility as a matter of procedure.

As a matter of procedure, the word "admissibility" has a different meaning in the context of Sec. 19(4) of the Act than what is normally understood by us. This has been explained by several writers. It is used in the sense that arbitrators are empowered to decide whether to "admit" or "exclude" a document.[17] Pilkov in his article states as follows:

> "Indeed, the concept of the general admissibility of relevant evidence is recognized in international arbitration. It was largely taken from the common law tradition (e.g. the US evidence law with respect to admissibility establishes one seemingly simple rule: all relevant evidence is generally admissible, evidence which is not relevant is not admissible). Thus, generally speaking all relevant evidence is admissible in arbitration except as otherwise provided by mandatory rules, or by agreement of the parties.

The concept of deciding to "admit" or "exclude" evidence gives the broad meaning to the term "admissibility" that includes the evaluation and assessment of evidence in deciding the case. *Arbitrators admit evidence;* that is why admissibility is the most general

16 *Id.*

17 Pilkov Konstantin, *Evidence in International Arbitration: Criteria for Admission and Evaluation. Arbitration*, The International Journal of Arbitration, Mediation and Dispute Management (2014).

condition for evidence to be admitted. In theory, the tribunal shall not consider evidence ruled irrelevant, immaterial or inadmissible *sensu stricto*. That is evidence is admissible *sensulato* if the criteria of relevance, materiality and admissibility *sensu stricto* are met. We believe that when arbitration rules and arbitration laws refer to "admissibility" as the specific criterion of evidence they use it mostly in the specific narrow sense which will be discussed further below.

The inadmissibility of evidence may serve as a ground for it to be refused in admission or in the ordering of production, or excluded from evidence if already admitted. Before addressing the main focus of this article, it is necessary to distinguish between refusal or exclusion on purely procedural grounds (e.g. non compliance with the terms established by the tribunal for submissions) and exclusion on the grounds of inadmissibility. The parties can agree or the tribunal can determine that evidence must be submitted in a timely fashion, in that respect, the tribunal can set a specific deadline for submission and can refuse any evidence submitted after that deadline. Non-compliance with the deadline by the submitting party does not directly affect the properties of the evidence and shall be dealt with as if it were a procedural issue, that is, evidence may be admitted if procedural fairness is not prejudiced. A similar approach can be taken if a party requests leave to exclude documents which were not exchanged. The arbitrators should not consider those documents to be automatically inadmissible. Where documents were not exchanged in accordance with the rules of procedure, the arbitrators may adjourn the hearing to afford the disadvantaged party a fair opportunity to examine and comment on the document."[18]

Mr. Ion Andronikos Iliopoulos in his thesis "Taking of evidence in international arbitration" submitted by him to the International Hellenic University" states as follows:

> "The International Arbitration recognizes that all relevant evidence is generally admissible. That rule was largely adopted from common law tradition, the essence of which dictates that, unless mandatory rules or the parties say otherwise, all relevant evidence should be recorded as admissible in International Arbitration…Admissibility in broad terms refers to admitting or refusing evidence but also to the evaluation and assessment of evidence."[19]

Mr. George C. Economou, on admissibility of evidence, is as follows:

> "**Admissibility** of Evidence in Common law procedure is characterized by technical, restrictive rules of evidence. Historically, international tribunals have taken the view that they should hear and consider everything that each party has to say concerning the dispute. The tribunal itself determines the relevance, materiality and probative value of all evidence submitted by the parties, and does not need to hear argument from the parties concerning these matters. It is for the parties to submit the evidence and for

18 *Id*.

19 Mr. Ion Andronikos Iliopoulos, *Taking of evidence in international arbitration*, (2017).

> the tribunal to evaluate it. International Tribunals will generally admit any evidence that a party deems necessary to establish its case, but they always have authority to determine that evidence is inadmissible in appropriate circumstances. Evidence may be excluded if it is duplicative, defamatory or obviously irrelevant. The admissibility and the probative value of any evidence submitted to it has been codified by various international bodies, including by the UNCITRAL law, the IBA and by the rules of various arbitral institutions such as the ICC, the London Court of International Arbitration and the International Centre for Settlement of Investment Disputes.[20]

Relevancy

Relevancy of evidence means the connection between the document or oral evidence with the issue before the Tribunal. It may be direct or indirect. It may also mean circumstantial evidence.

It has, however, been pointed out that under common law systems, "relevancy" is merged with the concept of "materiality" but under the law of arbitration and in particular in Article 19, both these are treated as separate concepts.

Mr. Pilkov in his article, states as follows:

> "The term 'relevant evidence' in common law generally means evidence having a tendency to make the existence of any fact that is of consequence in the case, more probable or less probable than it would be without the evidence. This definition issued in the common law of evidence in which the concept of materiality is merged with relevance."[21]

Similarly, Mr. Ion-Andronikos Ilipoulos, in his article states as follows:

> "The definition used in common law jurisdiction merges the concept of materiality into relevance which is a different from what applies in international arbitration, where these criteria are separated. Most arbitration rules give arbitrators the power to determine relevance and materiality separately"[22]

Arbitrators are reluctant to exclude evidence

Mr. lon-Andronikos Ilipoulos says that arbitrators are not inclined generally to reject evidence on the ground that it is not relevant because they are very conscious that the award may be set aside for such exclusion. He says as follows:

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20 Mr. George C. Economou, Admissibility and Presentation of Evidence in International Commercial Arbitration, www.greeklawdigest.gr/topics/judicialsistenVitem/208-admissibility-and-presentation-of-evidence-in-international-arbitration (last visited Jul 5, 2019).

21 *Supra* 17.

22 *Supra* 19.

> "Relevance is the first thing to be considered but it is practically very hard to distinguish relevant from irrelevant material. Arbitrators are reluctant in limiting evidence of questionable relevance submitted by the parties in support of their cases, as they are aware of the fact that the award could be set aside, if a party proves that it was deprived from its right to adequately present its case."[23]

Similarly, Mr. Pilkov also states the same thing as follows:

> "Though relevance is named as the first criterion for admission, in practice, it is not easy to separate the wheat from the chaff. *Arbitrators are reluctant to limit the evidence that can be submitted and normally err toward permitting parties to present evidence including the introduction of materials of questionable relevance. Arbitrators are mindful of the fact that their award can be set aside if a party was unable to present the case".*[24]

Materiality

As stated earlier, in arbitration, materiality is not treated as part of relevancy but is treated as a separate concept:

Mr. Wright in his article states, as regards materiality, as follows:

> "Materiality is the relationship between the reason the evidence is offered and an issue in the case. To be material this relationship must be one of cause and effect. In other words, if evidence is offered- the cause- its presence must in some way affect an issue in the case - the effect. If the evidence offered does not affect an issue in the case, that evidence is immaterial and should not be considered. In arbitration, issues are determined by the parties and the contract. For example, if the hearing involves discharge case, the usual issue is whether there was just cause for discharge. Evidence that the grievant was having an extramarital affair which did not affect job performance would be immaterial.
>
> On the other hand, in the same hearing on the same issue, if the extramarital affair was taking place during working hours and it was affecting job performance, such evidence, regardless of form, would be material.
>
> Another example of immateriality arises where there is offered into evidence a note from a customer stating that the grievant "is an excellent addition to the store. In this case the arbitrator must determine whether the note affects an issue in the case. If an issue is whether the employee was liked by customers, the evidence clearly does affect the issue. If the issue was whether the employee stole money from the employer, however, the

23 *Supra* 19.

24 *Supra* 17.

> customer's note making a job offer would not in any way affect the issue.
>
> How does materiality affect the weight of an out-of-court statement? The basic rule is that, if the out-of-court statement is not offered to affect an issue in the case, it should not be considered by the arbitrator. Under Rule 28 the arbitrator may exclude any immaterial evidence, such as hearsay evidence. In applying the materiality test therefore, the question is: What issue does the evidence affect? If the arbitrator finds that the hearsay evidence affects an issue in the case, the out-of-court statement passes the materiality test."[25]

Mr. Pilkov states in his article as follows:

> "The relevance of each element of materiality is a more or less independent category....Materiality is a dependent category: after the admission of one piece of evidence, each subsequent piece of evidence or testimony concerning the same fact, becomes less material. Materiality is thus ultimately connected with the sufficiency of evidence".[26]

Mr. Ion-Andronikos Ilipoulos in his article accepts the views of Mr. Pilkov.

Weight

> "Weight of evidence is the most important concept and it came to be added in the UNCITRAL rules of 1976. This term was added to the text at the final stage of the drafting process so as to emphasize the wide discretion which the arbitrators were to have.[27]

That was how the word "weight" was incorporated in the Article in the UNCITRAL Rules of 1976 by the U.N. Committee in its last session as being the most important concept and it was then carried into Article 19 of the Model law of 1985 and was adopted in Sec.19 of our Act, 1996.[28]

The concept of 'weight' governs all the aspects of admissibility, relevance and materiality.

Prof. Joseph N. McCarthy Mbadugha, in his article goes into details of the meaning of 'weight' and states as follows:

> "This (weight) refers to the probative value or cogency of evidence. Once a piece of evidence is admitted, the tribunal will consider what weight to attach to it and what it proves in the context of the issues in controversy between the parties. The fact that piece of evidence, oral or documentary, is admissible does not mean it has weight, it may not have any probative

25 *Supra* 14.
26 *Supra* 17.
27 Mr. David D. Caron and Lee M. Caplan, UNCITRAL Arbitration Rules: A Commentary, 573(2nd ed. 2013).
28 *Supra* 4.

value.

The weight to be attached to evidence is a matter of inference to be drawn from established facts. There is no canon for weighing evidence and drawing inferences from it. It depends mainly on common sense, logic and experience. Each case presents its own peculiarities and in each case, common sense and shrewdness must be brought upon facts elicited which a judge of facts has to weigh and decide.

Though there is no canon for weighing evidence, there are in existence some judicial and statutory guidance which may be followed. Thus, in estimating the weight, if any, to be attached to a statement rendered admissible as evidence, regard may be had to all the circumstances drawn as to accuracy or otherwise of the statement, and in particular: to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent fact; and in the case of a statement contained in a document produced by a computer, the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it contemporaneously with the occurrence or existence of the facts dealt with in that information and whether the person supplying the information had any incentive to conceal or misrepresenting facts.

Consequently, arbitral tribunals are usually left with the duty of deciding the weight or how to determine the weight that will be attached to the evidence presented to them. The issue of weight is determined at the time of assessing evidence. This is done at the completion of and closing of trials when parties and their attorneys are dispersed."[29]

Therefore, where hearsay evidence is adduced, it will be for the Tribunal to consider what weight has to be given to such evidence, whether it could be accepted only if there is other circumstantial evidence.

Mr. Wright in his article explains about the meaning of the word 'weight' in the context of hearsay, as follows:

> "Once the arbitrator has determined that the evidence is hearsay, it makes little sense to rule that it should not be admitted. The more appropriate response is to admit the evidence but to caution the parties that it will be given only the weight it deserves based upon its relevancy and reliability.
>
> What are the relevancy and reliability tests? Why do they become so important in dealing with hearsay?"[30]

29 Prof. Joseph N. McCarthy Mbadugha, Impact of Party Autonomy and Fair Hearing on Assessment of Evidence in International Arbitration(2015), http://www.zurnalai.vu.lt/teise/article/download/9835/7824 (last visited Jul 5, 2019).

30 *Supra* 14.

Conclusion

From the above literature and discussion on sub-clause (1) and (4) of Sec.19 of the Act, it follows that in international arbitration in India and domestic arbitration between Indian parties in India, the Tribunal is not bound by strict principles of evidence mentioned in the Indian Evidence Act or the Code of Civil Procedure. Resultantly, hearsay evidence becomes permissible in both types of arbitrations. On this aspect, all the leading writers are unanimous and there is no contrary view. That would mean that while proving a document or its contents, it is not mandatory to examine the author of the document or the person who received the document. Any person employed in the company or the firm can give evidence stating that the document has been sent or received by the company or firm in the ordinary course of business. He can also state that the contents of the document are true. That would be sufficient to take the document on record and use it and its contents part of evidence in the case, subject to the important provisions of sub-clause (4) of Sec.19 under which the Tribunal will consider its admissibility (meaning of which has been explained above), relevance, materiality and weight. Section 19, it must be noted, brings in a very flexible and wide procedure with ample discretion vested in the arbitrators in the matter of receiving evidence.

The following Standard Practice Direction would be useful as it reflects the principles contained in Sec.19 (1) and (4):

> "1) It is not necessary to ask a witness about the contents of a document if documents has been admitted by the party.
>
> 2)Counsel need not put suggestions of their respective cases to witnesses except in exceptional situations and the absence of any such question will not result in drawing any adverse inference.
>
> 3) Both sides have filed statements of Admissions and Denials of documents filed by the opposite side. Some documents have been denied so far as their genuineness or existence is concerned, some documents have been admitted and some documents have been admitted but the contents have not been accepted.
>
> 4) So far as the documents whose genuineness or existence is denied, the concerned party has to adduce evidence in proof of its genuineness or existence, subject to cross examination.
>
> 5) So far as other documents where the contents are not accepted, the Tribunal draws the attention of counsel to the provisions of Sec. 19 of the Act under which the Tribunal is not bound by the provisions of the Evidence Act, 1872 or the Code of Civil Procedure, 1908. The effect of such exclusions is that the strict rules of evidence are not applicable in arbitration proceedings. Under arbitration law, both in regard to international arbitration in India

and domestic arbitration between two Indian parties in India, the above exclusion of strict rules of evidence etc. apply.

6) It is also settled law, particularly on account of the exclusion of the strict rules contained in the Evidence Act, that hearsay evidence is permissible in arbitration and a witness who proves a document or the contents thereof, need not be the person who is the author thereof or who received the document and he can prove the document by giving evidence that it is sent or received in the normal course of business of the company or firm and he can also depose that the contents of the document are true. He can be cross-examined on the contents, if necessary.

7) Not only documents between parties but also documents which one party has sent to the opposite party or to a third party, or received from the opposite party or from a third party, are admissible in evidence subject to the Tribunal deciding upon their relevance, materiality, and weight as stated in Section 19(4).

8) As regards documents to which neither of the parties is a party, and documents between third parties, the Tribunal has powers to admit them and consider whether they have come into being in the ordinary course of business or whether they are relevant and if so what is the materiality and weight given to such documents."

Whether Arbitrators can raise new points of fact and law on the basis of existing Pleadings and Evidence

-Justice (Retd.) M. Jagannadha Rao

The topic discussed in this article relates to the question whether, when counsel in arbitration proceedings submit their arguments on facts and law and cite case law, the arbitrators can invite their attention to any issues of fact or law arising out of the pleadings or evidence or to some rulings of Courts which counsel had not noticed but which according to the Tribunal are relevant to the case?

It is common experience of several arbitrators that sometimes, new points of fact or law occur to the arbitrators during the course of arguments by counsel and they would like to put the same to the counsel to give them an opportunity to answer the same. It also happens sometimes that the counsel had not noticed important provisions of law or judgments of the Supreme Court or the High Courts or of some judgments of Courts in other common law jurisdictions which are relevant and the arbitrators would like to draw the attention of the counsel to the said judgments so that the counsel may answer the points more effectively.

It is now accepted that this can be done by the arbitrators subject to few exceptions .

The justification for the arbitrators doing so is found in Sec.28 of the Arbitration and Conciliation Act, 1996 which requires the arbitrators dealing with domestic arbitration to decide a dispute in accordance with the *"substantive law"* for the time being in force in

India, and in the case international arbitration to apply the *"rules of law designated by the parties"* as applicable to the substance of the

dispute. When arbitrators have a duty to apply the applicable laws, they have therefore a right to find out the details of the applicable laws and the judicial decisions relevant to the case.

I shall start with the judgments of U.K. which deal with the power and duty of arbitrators.

In the United Kingdom, the position is that the arbitrators can raise new questions of fact or law relevant to the case on the basis of their own research and this has been accepted in several judgments. However, the arbitrators have to put them the questions to the counsel, and elicit their response before proceeding to prepare his award.

It was stated by Ackner L. J in *Inter Bulk Ltd., v Aiden Shipping Co., (The Vimeira No.1)* (1984) (2) Lloyds Report 66 at 76 as follows:

> "The essential function of an arbitrator ... .is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts **have missed the real point ....** then it is not only a matter of obvious prudence, but **the arbitrator is obliged,** in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it ....."

Similarly, in *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd.,* (1985) 2 EGLR 14 at 15, Bingham L.J, observed:

> "If an arbitrator is ***impressed by a point that has never been raised by either side*** then it is his duty to put it to them so that they have an opportunity to comment. ***If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again*** it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that ***he should mention so that it can be explored.*** It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance .... "

Adverting to the above judgments, it was further stated in *Oao Northern Shipping Co v Remolcadores De Marin SL "Remmar"* (2007) EWHC 1821 (Comm), Ms. Justice Gloster, J (para 22) as follows:

> "These principles apply to un-argued points of law or construction as they do to unargued questions of fact. In such cases, whilst it is not necessary for the Tribunal to refer back to the parties each and every legal inference

> which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties "a fair opportunity to address its arguments *on all of the essential building blocks in the tribunal's conclusion" (ABB AG v Hochtief Airport (2006) 2 Lloyds Report 1 para 70)"*

In the United States, the position is the same. Judge William A Dreier, Judge of the Superior Court of Appeal of New Jersey who, after retirement, has been conducting arbitration and is also author of several books on arbitration, has stated as follows:

> "Perhaps my views are influenced by 25 years' experience on the Bench, 15 as an appellate Judge, but I strongly favour **independent research** by the arbitrator. Where an arbitrator is obligated to decide the matter in accordance with the law of a particular jurisdiction, I posit that the arbitrator must check on the parties' legal positions to be sure they have not overlook a case or statute that may govern of influence the result. I also feel strongly that the arbitrator is under a duty to inform the attorneys (or parties if pro se) of the results of any **independent research** and request comments, clearly noting that the independent legal conclusion are **only tentative** and that the input of counsel could show that the arbitrator's **tentative** independent conclusions may have been error. Such notice and an opportunity to be heard is essential".

There are, in my opinion, however some exceptions to the above duty of the Arbitrators informing the party or counsel about the legal principle, statute or rulings of Courts .

1) Where the point has been discussed during the arguments but the Arbitral Tribunal discovers the rulings subsequently, the Tribunal states that it has already put the point to the counsel and heard his response and that the Tribunal is now merely referring to rulings in support of the point.
2) Further, if the point is a consequence of the point already discussed during the arguments upon which the views of the counsel have already been given, it is not necessary to put the further consequence flowing from the point, to the counsel.
3) As held in *Oao Northern Shipping Co v Remolcadores De Marin SL "Remmar" (2007) EWHC 1821 (Comm),* "it is not necessary for the Tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it."
4) The above duty of the arbitrators applies only if the material they propose to rely affects the outcome of the case significantly.

There is a principle of *Iura Novit Curia* which means *"The judge knows the law"*. This principle emanated in the civil law countries where no serious importance is given to precedents and the parties and lawyers present their arguments on fact and generally leave the questions of law to be applied by the judge on the principle that the *"judges know the law".* The judge then applies the law and decides the case.

The said principle of *Iura Novit Curia* also applies to arbitrators with the condition that

before arbitrators use any new legal principle or statute or case law which they think is relevant to the case, they must put the same to the counsel, receive their response and then decide whether to apply the said legal principle or case law.

From the judgments of the U.K cited above and the opinion of the judge from U.S., it is clear that it is accepted that arbitrators can raise new questions of fact or law which arise out of the pleadings or evidence or any provisions of statute or any judgments of courts which have not been noticed by the counsel. But the arbitrators have to put the same to the counsel for their response before finalising the award.

This procedure is also accepted by several jurists and scholars and I shall refer to them.

Mr. Alexander Cica (University of Miami School of Law), in his article "The Principle of *"Iura Novit Curia"* (which means that the judge knows the law) *(published in the collection of essays by Miami University School of Law)* says that the above principle is based upon the distinction between facts and law and in civil jurisdiction where the decision maker will apply the law to the facts introduced by the parties and the judge is not bound by the statements of parties concerning the law and is therefore obliged to apply the law as he deems appropriate.

He states that the above principle is applicable to arbitration proceedings governed by express provisions of statute or Institutional Rules which require arbitrators to apply the applicable law. After referring to several statutes and Institutional Rules, he states "In sum, procedural rules established by important arbitral institutions foster the application of the principle of *iura novit curia*".

Arbitrator **Mr. Michael Oberman** states as follows:

> "I recognize that there are nuances to the issue, but I don't think that an arbitrators should issue an award which rests or an incorrect legal principle simply because the parties did not provide an accurate presentation of the law ..... .I am one who holds the view that an arbitrator can do **independent research** as long as the arbitrator shares the result of that research if it is going to affect the outcome."

Prof. M. E. Schneider, former Editor of the Michigan Law Review in his article: *"Combining Arbitration with Conciliation in International Dispute Resolution": Towards an International Arbitration Culture" n.10 at 62, ICCA Congress series no.8 (Kluwer Law International 1996),* states:

> "Nevertheless, arbitrators often **do not** consider themselves bound by the legal characterization given by the parties to their claims. However, where they do so, they should observe the right of the parties to be heard not only on the facts relied upon but also on the legal rules applied by the arbitral Tribunal."

Dr. C. Von Wobeser, former Vice Chairman ICC Court of Arbitration, in his article: *The Effective use of Legal Sources: How much is too much and what is the role for "Iura*

Novit Curia?" (https://www.josemigueljudicearbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/awards/iuria_novit_curia_icca_2010_von-wobeser.pdf) refers to the principles as mentioned below:

He refers to the role of the arbitrators in ascertaining the contents of the applicable substantive law in the light of their mandate towards the parties i.e., the task to apply the law which entails that arbitrators must establish the contents of the applicable law even when it has not been brought forward by the parties but arbitrators have to inform the counsel about their research so that the counsel could submit their response.

Dr. Wobeser says:-

> "The parties make full legal argument in writing and orally about the applicable rules. They may support this with legal materials and independent expert reports. The Tribunal may request further specific details about the applicable law. **It will, however, decide itself what the specific applicable rules are rather than rely on any expert.** This approach leaves considerable discretion to the tribunal and is increasingly the norm in international arbitration ... This approach reflects a neutral and international expectation that **the applicable law or rules must be ascertained and applied.** It recognizes that in international arbitration there is no domestic forum or foreign law. There is only the applicable law for the particular case."

He further states as follows:-

> "In my experience, arbitrators must use all available methods which allow them to establish the contents of the law chosen by the parties to resolve the issue. Among the methods which I have used in practice the following are worth mentioning:
>
> a) Seeking support from co-arbitrators, when they have specific knowledge on the applicable law.
>
> b) ..... c) ..... d) ..... e) ..... f) .....
>
> g) Another valuable method of establishing the contents of the law is posing additional questions to be answered by both parties, in closing briefs.
>
> **h) Furthermore, the arbitral tribunal should also conduct an independent study of the law where relevant.**
>
> i) Arbitrators should make available for examination and critical analysis by the parties any specific legal points which have not been addressed by the parties and which will be part of the basis of the award.

Dr. Wobesar, says in conclusion that in practice, arbitrators have flexibility, and as such

they must use all available methods in order to arrive at the hearing with sufficient knowledge which allows them to present relevant questions to the parties and focus on relevant and core issues. If and when the arbitral tribunal is able to spot these issues and questions both. the parties and experts during the hearing, the discussion will bring them a step closer to knowing the law and applying it.

He also states that in an arbitral tribunal of three arbitrators from different countries and one arbitrator is more familiar with the applicable law of the country designated in the contract, the other arbitrators must give weight to the views of that arbitrator.

Finally, the hearing is the perfect moment for arbitrators to confront any legal issues and:

i) determine how to apply the law chosen by the parties;

ii) establish the contents of the law or address any error of law or clarify any issues relating to the remedy sought,

iii) give the parties sufficient opportunity to comment on provisions of the applicable law and

iv) thereby ensure the validity and enforcement of the award."

Prof. Ms. Chainais Cecile of the University of Picardie *(2010)* (Issue I pages 3-44 ,e at 5-6) states that the Arbitral Tribunal's **liberty of determining the applicable law** in a dispute entails a duty resulting from the mission conferred upon it by the parties; the Arbitral Tribunal will have to decide the dispute based on law.

Prof. Alberti Christian P at the New York University School of Law: *International Commercial Arbitration Chapter 1 Kluwer Law International* (201 I) (pp 3-32 at 24) states that the tendency of case law in various jurisdictions has also recently shifted towards accepting that international arbitrators may indeed **ascertain and apply** the applicable substantive law **on their own initiative**.

It is stated by **Mr. James H. Carter,** Vice Chairman of New York International Arbitration Centre says in his article *International Arbitration and the Duty to Know the Law, Journal of International Arbitration, The Hague (Vol.28, Issue 3 f.n.25 page 209)*) that the Arbitral Tribunal is to resolve issues of fact and law that shall arise from the claims and counter claims and pleadings as duly submitted by the parties, including, any additional issues of fact or law which the arbitral tribunal, in its own discretion, may deem necessary to decide upon for the purpose of rendering any arbitral award.

In **Kluwer Arbitration Blog (2019)** in the article *"Give me the facts and I'll give you the law: What are the limits of the Jura Novit Arbiter Principle of International Arbitration* (http://arbitrationblog.kluwerarbitration.com/2019/01/10/give-me-thefacts), it is stated as follows:

> "'Knowledge of law' must be understood in a manner related to the specific case. The Arbitrator is not obliged to know all the laws, but his mission is to use the legal tools (within the rules of the game) to settle the dispute in accordance with justice. Is it now precisely for this reason that they were

> appointed by the parties? It would be absurd to say that a Tribunal exercises its powers to settle the disputes only on the basis of what has been said by the parties.
>
> If within their analysis of the laws, the arbitrators identify some rule or principle that has been ignored by the parties (involuntarily or voluntarily) and that could be crucial to the decision of the case, should be Tribunal simply ignore the said rule or principle because the parties did not mention it?. The task of the Tribunal to submit an award strictly according to law, is not bound by what has been said by the parties. "

Conclusion

From the above principles explained by various judges and jurists, it follows that arbitrators are not confined to the issues of fact or law raised by the parties or argued by counsel but have the authority to raise new issues of fact arising out of the pleadings and evidence and also to new principles of law which are part of the applicable law and any other rulings of Courts which are relevant but which have been ignored by the parties or counsel. However, the arbitrators have to put the above issues of fact and law to the parties or their counsel, seeking their response. The arbitrators are also expected to conduct independent research into the applicable law or to any relevant precedents not cited by the counsel. However, the e arbitrators have to inform the counsel about the same before finalising the award. There are however a few exceptions to this procedure as mentioned earlier.

How to Prove Documents Downloaded from the Internet as factual evidence in Arbitration Proceedings

-Justice (Retd.) M. Jagannadha Rao

In several arbitrations, parties rely upon factual evidence obtained by them from the Internet. They may be documents explaining the technology of a machine or the meaning of certain medical, scientific or other terms. The evidence may also be of certain documents downloaded from Government websites such as the one of the Ministry of Corporate Affairs, e.g an Annual Report of a Company or other information about a Company or from the websites of some Public Sector Undertakings or reliable Private sector websites or other information.

As the factual evidential material is downloaded from the Internet, the question arises as to how the document has to be proved in arbitration proceedings.

The procedure that is followed is like this. The party relying upon the factual evidential material from Internet may initially file the same before the Arbitral tribunal with a copy to the opposite side. In case proof thereof is demanded, the party or its counsel has to download the material from the Internet before the Tribunal in the presence of the opposite party or its counsel. Then the objections, if any, by the opposite counsel regarding relevance, materiality and weight can be considered by the Tribunal in accordance with the provisions of sub-clause (4) of Sec.19 of the Arbitration & Conciliation Act, 1996.

In this article, I am not referring to the proof of electronic evidence

as required by Sec.65B of the Indian Evidence Act, which deals with proof of e-mails and other communications between parties or with the judgments of Supreme Court in *State (NCT of Delhi) v. Navjot Sandhu* (2005) 11 SCC 600 or to the subsequent judgment in *Anvar P. V. v. P.K. Basheer* (2014) 10 SCC 473.

I am also not dealing with the issue whether the arbitrators can themselves do research on facts in Google to discover factual evidence relevant to the case. In some cases, it has been held that the Court (arbitrators) may go to the Internet in search of some factual evidence relevant to the case, as happened in ***U.S. v. Bari*** 599 F 3d 176 (2010). In that case, the Judge searched in Google if yellow hats similar to the one the accused was wearing (as disclosed in the CCTV), was available in the local market and based upon his research in Google that such hats of different sizes were available, the trial judge used the evidence to convict the accused. The Second Circuit accepted the procedure adopted by the trail Judge. There are a number of other cases in which judges had discovered facts and used the same to come to conclusions on fact. But **we are not** concerned in the present article with the powers of the court or about the right of the judges to search in the Internet for factual evidence. We are concerned with the right of parties or the counsel to rely upon factual evidence downloaded from the Internet.

The best article on the subject is ***"Trial by Google: Judicial Notice in the Information Age"*** by Prof. Jeffrey Bellin & Prof. Andrew Guthrie Ferguson (North Western University Law Review Vol.108 (p. 1137) (2014)) where all aspects are exhaustively discussed.

That article deals with use of Internet factual evidence by both lawyers and judges. As stated above, we are here concerned only with the use of Internet factual evidence by lawyers and we are not concerned with the question whether judges can use Internet factual evidence for deciding a case.

At the outset, the above scholars state that the article presents a theory of judicial notice for the information age and that the ease of accessing factual data on the Internet allows judges and **litigants** to expand the use of judicial notice in ways that raise significant concerns about admissibility, reliability and fair process.

The above authors describe the present use of computers all over the world to access the information from the Internet. They state as follows:

> "Computers are now a common sight in courtrooms. Judges sit behind screens. Litigants bring laptops and tablets to counsel table. Clerks and paralegals those have access to smartphones, computers, and every devices can retrieve on the Internet. As a result, answers to **factual questions** that arise in court are now just one search away: Did the accident occur on a one-way street? Was the bank closed at the time of the robbery? Had the area flooded in the last year? Participants in the fact-finding process can now access a reliable, factually accurate answer by "Googling" it or using equivalent electronic search technology. A Judge could pull up an image of the official road signs on the street in question. A prosecutor could show

> on the bank's website that the bank is closed on Saturday afternoons. The insurance defendant could show past flood records from an official government page. Because of the vast amount of information on the Internet, **facts** are, more than ever before, capable of being **"accurately and readily determined from sources whose accuracy cannot reasonably be questioned"** the test for judicial notice under Federal Rule of Evidence (and under the majority of state evidence codes)"

Then they deal with principles of judicial notice prior to the Information Technology era. Thereafter, they deal with the present age.

In Part II of the article under the heading "Judicial Notice in the Information Age", they state:

> "The boundless avenues for fact-finding presented by the novel combination of an expansive judicial notice rule and the Internet's vast repository of information are already on display in American courts. The ubiquitous practices of "Googling" unfamiliar people and things, checking weather and geography online, and seeking supplemental information on any topic through a click of a mouse are predictably moving from our personal lives onto the pages of judicial reports. The importance of judicial notice to this phenomenon is its ability to sweep away a series of evidentiary hurdles that might otherwise frustrate efforts to bring information obtained on the Internet into the courtroom."

The authors then refer to the **first** evidentiary **hurdle** namely, **"authentication"** of online sources as evidence. Thereafter, they deal with the **second** evidentiary **hurdle,** namely, prohibition against **"hearsay"**.

They say that judicial notice provides a sensible path through these two legal hurdles of "authentication" and "hearsay'' as stated below:

> "By taking judicial notice of information contained on pertinent websites, **courts can sweep away authentication and hearsay hurdles-**an acceptable practice, under the Federal Rules of Evidence, so long as judicially noticed source is one whose "accuracy cannot be reasonably questioned". Consequently, as **attorneys,** judges and jurors become more comfortable with the reliability of information found on the Internet judicial notice could become an ubiquitous mechanism for introducing the knowledge of the Internet to litigation. In fact, **existing case law** already provides a window into the online future of judicial notice".

So far as **Government websites** are concerned, the authors say that courts often take judicial notice of such information with little discussion of potential objections. In *Askew v. Secretary of Health and Human Services* (2012) WL 2061804, the Court of Federal Claims of U.S. took judicial notice of the symptoms of an unusual medical condition, as reflected in the online publication by the National Institutes of Health. Armed with this knowledge,

the Court concluded that the plaintiff would not have known (for statute of limitation purposes) the nature of his claim at the onset of symptoms because of the ambiguous nature of the disorder's typical symptoms. In *Gent v. CUNA* (611 F3 d 79), the First Circuit took judicial notice of the description of Lyme disease published in the website of the Centre for Disease Control and Prevention. Similarly, a Court in Texas took judicial notice of the "appraised fair market value of property'' (as published in the County Website) at issue in the litigation. *(Kew v. Bank of America)* (2011) WL 1414978)

So far as judicial notice from **Non-Governmental websites** is concerned, the authors say that courts take judicial notice of medical information published on the sites like Mayo Clinic Website (*Perez v. St. John's* Sch. 814 F, 2dn 102) and facts reported on the websites of CNN, BBC, and Yahoo *(Chhetri v. U.S Department of Justice* (490 F 3d 196) decided by 2nd Circuit), and information contained in online flight schedules *(United States v. Allick* (2012) WL 32630).

Corporate websites containing pertinent information has also been judicially noticed. A court took judicial notice of corporate relationships between insurance companies involved in the litigation before it as shown in one of their websites, a source ' whose accuracy cannot reasonably be questioned. *(Total Benefits Planning Agency Inc v. Anthem Blue Cross and Blue Shield)* (630 F. Supp.2d\842 (2007).

Reference is then made to the admissibility of **Google Maps** taking notice of information found on the website. Courts often rely upon Google Maps to establish the distance between two Geographic points (e.g a defendant's location and the scene of the crime *McCarmack v. Hiedeman* 694 F3d 1004 (9th Circuit) (2012). By taking judicial notice, the courts and **litigants skip over thorny evidentiary questions relating to accuracy and hearsay** and they state as follows:

> "Several factors make the prospect of more widespread and rational judicial notice of online sources attractive. Most obviously, the exercise can bring reliable information into the decision-making process, leading to more accurate determinations. In addition, online information is available to everyone and easy to access. **Counsel** need not worry about whether the Internet will cooperate, assert a Fifth Amendment privilege, or slant its story when approached by one party or the other to litigation. Google Maps cooperates with all on equal terms-it does not change its story based on the inquirer. Further, using the Internet is largely free of charge (or, more precisely, free of incremental costs). Even websites that do assess a fee are generally less expensive than analogous sources of information, such as experts. An overburdened, under-motivated, resource-strapped public defender can review, and seek judicial notice of, the same websites as the most high-powered, well-funded white-collar defender. Finally, by **removing unnecessary evidentiary obstacles,** judicial notice 'preserves court time and resources, while also decreasing the burden on witnesses who might otherwise have to testify on uncontroversial points, such as the

> authenticity of a printout from Google Maps or the owner of the website, "www.mcdonalds.com."

Thus the direct unloading of the material from the Internet in the presence of the Arbitral Tribunal, removes the hurdles of authentication and hearsay.

It is also stated that the Courts should always preserve a copy of the source material and a print-out of the source.

Finally, the authors conclude state as follows:

> "Judicial notice of information contained within Internet sources offers an efficient and accurate shortcut to resolve many issues in trial. Courts should embrace this new innovation on an old subject. Inqeed, many courts are already taking judicial notice of Internet sources, and this trend will only accelerate over time. Jurors, too, will be increasingly tempted to (improperly) access online sources during trial as they do in their everyday lives. The real question, then, is not whether to allow online information to influence legal outcomes, but how to regulate the inevitable flow of that information to fact-finders."

Conclusion

The above literature shows that parties and counsel can get over the hurdles of authentication and hearsay when they download factual evidence before the Tribunal, relevant to the case from the Internet, including Government websites, Non Governmental websites, Corporate websites and from Google to support the factual evidence in a given case before the Arbitral Tribunal. The party or counsel can initially file the same before the Arbitral Tribunal with copy to the opposite party or its counsel. In case it is challenged, the party or counsel filing the same, should, in order to satisfy the Arbitral Tribunal and the opposite party, download the document from the Internet in the presence of the Arbitral Tribunal and in the presence of the opposite party or its counsel. Any objections about the authenticity or objections as to relevancy, materiality and weight can be argued by both the counsel.

JUSTICE D.N. PATEL

The Chief Justice, High Court of Delhi

Justice Patel was born on 13th March, 1960. He passed S.S.C. in the year 1975, B.Sc. from M.G. Science College, Ahmedabad in the year 1979 and M.Sc. with Organic Chemistry from University School of Science in the year 1981. He did his LL.B. degree in the year 1984 with first class and LL.M. with First Rank in the First class in the year 1986 from L.A. Shah Law College, Ahmedabad.

He got two Gold medals, one of Principal M.S. Pandit Gold Medal and another from Bombay Hindu Law Research and Reform Association. He was a National Scholar in the year 1983-84 and 1984-85.

He enrolled as an Advocate on 28th July, 1984 and practiced at the High Court of Gujarat. He practiced in Civil, Criminal and Constitutional matters as well as Excise and Custom matters on behalf of Union of India at the High Court of Gujarat. He was appointed as a Special Counsel of the State of Gujarat in other High Courts. He was a panel advocate of various Institutions/Authorities like Gujarat Public Service Commission (GPSC), Ahmedabad Urban Development Authority (AUDA), Ahmedabad District Panchayat, Provident Fund Commissioner, BSNL, AICTE, New Delhi etc. in the High Court of Gujarat. He was also a counsel on behalf of State of Maharashtra at the High Court of Gujarat.

Justice Patel served as part-time lecturer in Sir L.A. Shah Law College, Ahmedabad for 9 years, both at LL.B. and LL.M. Level.

He was appointed as Additional Central Government Standing Counsel by the Union of India, in the year 1999 and as Senior Central Government Standing Counsel by Central Government for High Court of Gujarat on 5th July, 2001.

Justice Patel was elevated as an Additional Judge of the High Court of Gujarat on 7th March, 2004 and took oath as permanent Judge of High Court of Gujarat on 25th January, 2006. On transfer, he took oath as Judge of the High Court of Jharkhand, Ranchi on 3rd February, 2009.

Justice Patel was appointed as Executive Chairman of Jharkhand State Legal Services Authority from August, 2012.

Justice Patel was appointed as Acting Chief Justice of the High Court of Jharkhand from 4th August 2013 to 15th November 2013 and from 13th August, 2014 to 31st October, 2014. He Appointed as Chairman of Search Committee in the month of June & July, 2013 for appointment of Vice Chancellors of Kolhan University; Nilamber Pitamber University; Vinoba Bhave University; Siddhu Kanhu Murmu University and Vinoba Bhave University for Pro Vice Chancellor.

Justice D.N. Patel has also been nominated as:

- Member of General Body of National Judicial Academy, Bhopal (M.P.)
- Member of Central Authority (NALSA) vide Notification dated 4th February, 2016
- Members of the "Committee for sensitization of Family Court Matters"
- Re-nominated as Ex-officio Member of Central Authority (NALSA) vide Notification dated 5th April, 2018

Justice Patel was appointed as Acting Chief Justice of the High Court of Jharkhand from 10th of June 2017 to 10th August, 2018 and from 24th of May 2019 to 6th June, 2019.

Justice Patel is the Chief Justice of Delhi High Court since 7th June, 2019.

Arbitration in the COVID Era

-Justice D.N. Patel

Introduction

Currently the world has been confronted with an unprecedented crisis. The destructions caused by the pandemic are multi-dimensional ranging from life and health of people to contraction of some of the most powerful economies of the world. As with all sectors, the justice delivery system including the Alternative Dispute Resolution mechanism stands severely affected. In the past few months, we have seen a paradigm shift of the Courts and the Tribunals from physical hearings to virtual hearings and from paperwork to paperless work. In an attempt to cope with the institutional challenges posed by the pandemic, the Courts have adopted various measures to ensure and facilitate justice dispensation.

This article aims to discuss the changes that COVID-19 has necessitated in domestic and International Arbitrations and the manner in which courts, in India and elsewhere, have adapted to these challenges. The article further discusses the steps taken by Delhi International Arbitration Centre (hereinafter "***DIAC***") by adopting best practices in the field of arbitration during this hour of pandemic. The article also discusses the orders passed by the Hon'ble Supreme Court of India relating to arbitration in *suo moto* petitions and finally we look at some of major judicial pronouncement by the Supreme Court.

Impact of COVID on domestic and International Arbitrations

The outbreak of novel COVID-19 was identified as a "public health emergency" of international concern by the World Health Organization on 30th January, 2020. Within no time it became a global crisis which severely affected the life, business and economy of various countries across the globe. To contain the spread of virus, the Government of India imposed a nationwide lockdown from 25th March, 2020, in the hope that it would "flatten the curve" of the COVID pandemic. The judiciary has had to grapple with the challenges posed by the lockdown. COVID has had unprecedented implications not only on life and economy of various countries but also the justice delivery system including the Alternative Dispute Resolution mechanism. As the arbitral proceedings in most of the domestic arbitrations seated in India used to be conducted physically, the entire arbitration system in India including *ad hoc* and institutional arbitration came to a standstill. With the imposed travel restrictions across the globe, international arbitrations have been the most affected. Almost all the major Arbitral Institutions in the world closed their offices for physical hearings of arbitration matters and thereby affecting the progression of domestic and international arbitrations worldwide.

Virtual conferencing and e-Arbitrations

The technology of Virtual Conferencing for justice dispensation was far from being utilized in the pre- pandemic times. Despite, International Arbitration Centres in India like the Delhi International Arbitration Centre (DIAC) already offered the facility of Video Conferencing before the pandemic, this facility was hardly used by the Tribunals by and large. The tribunals resorted to the traditional mode of physical hearings.

Similar to Virtual Conferencing is the concept of eArbitration which is still far from being explored by the Arbitral Tribunal seated in India. The concept of eArbitrations is however, a familiar form of arbitrations for the international arbitrations seated outside India. eAbitration refers to the use of electronic means like e-mail and electronic file management systems to be used through the internet. EArbitration is different from traditional arbitration because the process may be held online, and also because the core elements of arbitration like evidence, arguments, filing and hearing are done in different way i.e through virtual platform.

Technology: extricating from the physical proceedings

In the Indian scenario, although several efforts were made in the past to calibrate the system of virtual courts, the same were not largely accepted by the litigants, counsels and the judiciary as well. With large docket of pendency in Indian courts, the overcrowded Court rooms became part of the Indian justice delivery system. Obviously, the term 'social distancing' was never heard of in the Indian Courts till this pandemic.

The justice delivery mechanism has faced several obstacles in its history but none of them have disrupted the entire system as has been done by the COVID pandemic. The COVID-19 pandemic and the national lockdown made it vital that the justice delivery system

including the alternative dispute resolution mechanisms such as mediation, conciliation and arbitration continue functioning and most importantly, while scrupulously adopting the measures recommended for containing the pandemic such as social distancing. The courts and the tribunals have risen to the challenge and reposed their trust in technology for conduct of proceedings via video conferencing.

The Hon'ble Supreme Court of India in a *Suo moto Writ* framed Guidelines for Court functioning through video conferencing during COVID-19 pandemic[1]. Thereafter, the Delhi High Court framed rules for conducting hearings through Video Conferencing which came into effect from 01st June, 2020[2]. Several notifications and Circulars have been issued by various Courts across the country making an effort towards switching the Video Conferencing mode of hearings.

Recently, a report of Parliament Standing Committee on Functioning of Virtual Courts/ Court Proceedings through Video Conferencing[3] noted *"that Court is a Government entity comprising one or more judges and that Court deals with the administration of Justice thus making it clear that Court is more of a Service than a place."*

> *"..Virtual Courts have their own shortcomings, however, they constitute advancement over the existing system, and therefore, on the overall, they are worth embracing. These current shortcomings might be overcome through existing and emerging technologies."*

Giving its views on Integration of Virtual Courts into the Legal Ecosystem the report stated:

> "Information and Communication technologies have impacted every facet of human life. Global legal systems are increasingly embracing evolving technologies to keep pace with the information society. It is time, the Court room which is often regarded as the last bastion of antiquated working practices opens its doors to latest technology."

The overnight notifications issued across the various courts during COVID pandemic is demonstrative of the fact that our courts are well equipped to act fast and act decisively. A close review of the recent developments in the new technology that became available overnight shows the rapid migration to online mode of hearing has become a new normal for the regular functioning of the courts and the arbitral tribunals.

Tackling the crisis: An International perspective

The spread of pandemic has led judicial system and arbitration mechanism of various countries to take significant steps to attenuate the risks attached to the COVID-19. These steps majorly include deviating from the normal course of business and resorting to the

1 Order dated 6th April, 2020 passed in Suo Moto Writ (Civil) No. 5 of 2020

2 High Court of Delhi Rules for Video Conferencing for Courts 2020

3 Report No. 103 by Department-related Parliamentary Standing Committee On Personnel, Public Grievances, Law And Justice on Functioning of Virtual Courts/ Court Proceedings Through Video Conferencing (Interim Report) presented on 11th September, 2020

virtual mode of hearings and reducing the paperwork. The arbitral institutions across the globe have made the best possible use of the available technology to ensure progression of the arbitral proceedings.

Almost all the overseas International Arbitral Institutions have completely restricted physical hearings at their office premises. Some institutions have issued Guidance Note for the tribunals, lawyers and the parties for conducting hearing while mitigating the effect of COVID-19. In order to secure the health and safety of stakeholders, the hearings are conducted virtually and Secretariat of most of the Arbitral Institutions abroad is working remotely. Most of the institutions are entertaining the fresh claims by emails or through their online filing system. Institutions are also encouraging the users to follow the precautionary measures stipulated by the government guidelines.

Steps taken by Governments of foreign countries - Triggered by the COVID-19 Pandemic, the UK passed the Coronavirus Act, 2020 and amended the provisions of various statutes to facilitate the regular operation of its courts by participating through video or audio conference through a combination of Skype for Business, Justice Video Service and BT Meet Me. It has also provided for public participation through live links. Specifically the background to the Bill states "The measures will enable a wider range of proceedings to be carried out by video, so that courts can continue to function and remain open to the public, without the need for participants to attend in person. This will give judges more options for avoiding adjournments and keeping business moving through the courts to help reduce delays in the administration of justice and alleviate the impact on families, victims, witnesses and defendants." The pilot project for remote courts in the UK was operationalized in 2018 through the Traffic Penalty Tribunal with the heartening statistics that parties requested a review of only three percent (3 %) of the decisions.

Similarly, the Singapore Supreme Court, High Court and Family Courts have adopted video conferencing or telephone conferencing through the various online platforms for hearings, counseling and mediation. Courts in the United States of America, Canada and Australia too are bracing themselves to conduct matters in a similar manner.

Tackling the crisis: an Indian perspective and role of DIAC

Several arbitral institutions administer arbitrations under their own rules or under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules").[4] The Indian arbitration regime was equally affected by the pandemic. In India where virtual modes of hearings were hardly used even in cases of International Arbitration, the entire arbitration ecosystem came to a standstill when the country moved into the lockdown. Where most of the arbitral institutions in India were only providing the facility for video conferencing in order to progress with the arbitration, DIAC became a leading institution to bring the international best practices in need of this emergency situation. After resumption of its partial functioning from 08th June, 2020, DIAC started holding the hearings through video conferencing. Unlike other

4 Source: Report by the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, headed by Justice BN Srikrishna

arbitral institutions, the facility of video conferencing is provided by the DIAC without any additional charges. In order to facilitate these hearing seamlessly a detailed "Guidance Note" for the parties, Counsels and the Arbitrators was notified by the Arbitration Committee of DIAC chaired by Mr. Justice J.R. Midha. This Guidance Note took into account all the possible difficulties that could be faced by the parties, counsels and the arbitrators while conducting the hearings through video conferencing. This detailed Guidance Note covered all the aspects of the arbitral proceedings right from the stage of filing of the reference till the pronouncement of the Award.

Some of the distinct aspects of the DIAC Guidance Note are briefly discussed below:

- The facility of the Video Conferencing can be availed by the arbitrators and in cases where the VC is not feasible the arbitrators could conduct the hearings in a restricted environment.
- Each hearing conducted through VC is facilitated by Deputy Counsels appointed by DIAC who ensure seamless conduct of hearing through VC. The Deputy Counsels liaise with the arbitrators, parties and the counsels and deal with the queries related to hearings through VC and DIAC Rules.
- For simultaneous recording of proceedings, the DIAC provides the facility of trained stenographers in the VC hearings.
- The filing of fresh cases and applications, documents etc. in the pending cases is being done through email. The Awards are also pronounced by the tribunal electronically on emails.
- Interestingly, the Guidance note incorporated a provision where in order to address the oral arguments, counsels can file a video clip of their oral submissions in addition to the written submissions.
- The Guidance Note also provides the manner of conducting the Evidence.
- The payment of Arbitrators fees and Administrative expenses of DIAC is being done through online remittances.

In order to ensure proper case management alongwith health and safety measures the DIAC Secretariat, DIAC Counsel and Staff members are processing the case files electronically. The queries of the parties, arbitrators are dealt telephonically or over emails.

THE *SUO MOTO* PETITIONS

The imposition of nationwide lockdown to counter the spread of COVID-19 was becoming a matter of grave concern for litigants and lawyers, more particularly with respect to the limitation period (which as per law does not stop once it starts running). As the physical functioning of the Courts and Tribunals were discouraged, filings of suits, appeals, application etc. within the period of limitation became difficult especially under laws like the Arbitration Act which provide stricter timelines and limited scope of condoning the delays. Taking *suo moto* account of the COVID situation and its consequent challenges, the

Hon'ble Supreme Court of India vide its order dated 23rd March, 2020[5] extended the period of limitation for filing the petitions/applications/suits/appeals/all other proceedings under the law of limitation or under Special Laws (Central and/or State) w.e.f. 15th March, 2020 till further orders. Further, vide the order dated 06th May, 2020[6], the Hon'ble Supreme Court held that all periods of limitation prescribed under the Arbitration Act shall be extended from 15.03.2020 till further orders. However, Arbitration Act does not only provides periods of limitations but also provides for timelines for completions of pleadings and passing of the Arbitral Award. Therefore, the Hon'ble Supreme Court vide its order dated 10th July, 2020 modified its earlier order and extended its orders dated 23rd March, 2020 and 06th May, 2020 to timeline prescribed for completion of pleadings under Section 23(4) and for making an arbitral award under Section 29A of the Arbitration Act.

> The *suo moto* cognizance of the Hon'ble Supreme Court is a reflection of pro arbitration approach of the Indian Judicial System. Where the Arbitration and Conciliation Act, 1996 provides a stricter timelines and limitations in the interest of the parties, these can be relaxed in the emergency situations where it has become difficult to comply with the said period of limitations and timelines.

Significant judgments pronounced during the lockdown

Even working with restrictions, the Courts across the nation have pronounced some of the most landmark judgments during this hour of pandemic. The following two major judgments in arbitration law pronounced by the Hon'ble Supreme Court while working through video conferencing are notable:

In *Patel Engineering Limited vs. North Eastern Electric Power Corporation Ltd. (NEEPCO),*[7] the Supreme Court of India reaffirmed the ground of patent illegality as a ground for challenging the award under Section 34 of the Arbitration and Conciliation Act, 1996 post 2015 amendment. The Court relied on its earlier judgments of *Board of Control for Cricket in India vs. Kochi Cricket Private Limited, Associate Builders vs. Delhi Development Authority* and *Ssangyong Engineering and Construction Company Limited vs. National Highways Authority of India.*

In Centrotrade Minerals and Metals Incorporated vs. Hindustan Copper Limited,[8] the Supreme Court held that the award shall be executed as a foreign award, answering to the second question of the earlier judgment in *Centrotrade Minerals & Metal Inc. vs. Hindustan Copper Limited*[9]*.* The case involves a two-tier arbitration agreement which stipulated that in case a party disagrees to the first arbitral award it can move in appeal to International Chambers of Commerce in London for a second tier arbitration. In the 2017 judgment

5 Passed in Suo Moto Writ Petition (C) No. 3/2020 by three Judge Bench presided by the Hon'ble Chief Justice of India.

6 Passed in I.A. No. 48411/2020 filed in Suo Moto Writ Petition (C) No. 3/2020 by three Judge Bench presided by the Hon'ble Chief Justice of India.

7 Judgment dated 22.05.2020 passed in SLP (C) NOS. 3584-85 OF 2020

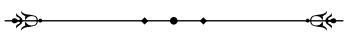
8 Judgment dated 02.06.2020 passed in CIVIL APPEAL NO.2562 and 2564 OF 2006

9 (2017) 2 SCC 228

(supra), a three judge bench on a reference held the arbitration agreement to be valid and left the question open on whether the award rendered in the appellate arbitration being a "foreign award" is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996. This question was answered by way of present judgment. The Court directed the enforcement of award pronounced by International Chambers of Commerce in London as a foreign award.

Conclusion

To conclude, it is safe to suggest that the Indian and the International Judicial Systems and the ADR mechanisms have made a quick shift by adapting new methods for justice dispensation which reflects on the flexibility of our systems in emergent situations. COVID has given an opportunity to India to modernise its current legal system and make best possible use of the available technology. Although this system is a work in progress and improvements are definitely desirable, there is no iota of doubt that consistently developing technology and legal framework can together overcome these challenges. Indian arbitration regime should not renounce the practices that it has adapted during this hour of pandemic. A combination of physical and virtual hearing can make our system more flexible, cost effective and convenient.



JUSTICE HIMA KOHLI

The Chief Justice, High Court for The State of Telangana

Justice Kohli was born on 2nd September, 1959 in Delhi. She did her schooling from St. Thomas School, New Delhi and graduated in History (Hons.) from St. Stephens' College, University of Delhi. She completed her Post Graduation in History in First Division and thereafter, joined the L.L.B. course at the Law Faculty, Campus Law Centre, University of Delhi. On completing the law course in the year 1984, she got enrolled as an Advocate with the Bar Council of Delhi in the same year.

Justice Kohli was the Standing Counsel and Legal Advisor of the New Delhi Municipal Council in the High Court of Delhi from 1999-2004. She was appointed as the Additional Standing Counsel (Civil), Government of National Capital Territory of Delhi in the Delhi High Court in December, 2004 and has represented Government of Delhi in several important public interest litigations. She was the Legal Advisor to the Public Grievances Commission, Delhi Pollution Control Committee, National Agricultural Co-operative Marketing Federation of India, National Co-operative Development Corporation and other private organizations, banks, etc. She was a member of the Delhi High Court Legal Services Committee, a statutory body constituted under the Legal Services Authority Act.

Justice Kohli was appointed as an Additional Judge of the High Court of Delhi on May 29, 2006 and took oath as a permanent Judge on 29.08.2007.

She was appointed as a Member of the General Council of the West Bengal National University of Judicial Sciences, Kolkata from 11.8.2017. She was also nominated as a Member of the Editorial Committee of 'Nyaya Deep', the official journal published by National Legal Services Authority from 07.05.2019.

Justice Kohli is appointed as the Chairperson of the Committee of the Delhi Judicial Academy from 11.3.2020. She is also appointed as the Chairperson of a High Powered Committee constituted by the Govt. of NCT of Delhi on 26.3.2020, in terms of the order dated 23.3.2020 passed by the Supreme Court of India for decongestion of jails in all States/ UTs in view of the COVID-19 pandemic.

Justice Kohli is appointed as the Executive Chairperson of the Delhi State Legal Services Authority from 20.05.2020, Chairperson of the Delhi High Court Middle Income Group Legal Aid Society from 29.06.2020 and Member of the Governing Council of the National Law University from 30.06.2020. She is the member of the Administrative and General Supervision Committee of the High Court and the Chairperson of the Delhi High Court Building & Maintenance Committee, Mediation & Conciliation Committee and the Family Courts Committee.

Apart from performing her official duties as a Judge, she takes a keen interest in promoting mediation as an alternative dispute resolution forum, in highlighting the role of the judiciary in preservation of the ecology and environment and the role of Family Courts in resolving family disputes. She has participated in and presented papers at several national and international symposiums and conferences on these subjects.

Delhi International Arbitration Centre

MED-ARB: A More Successful Model?

-Justice Hima Kohli

Introduction

Indian Courts are overburdened with a huge backlog of pending cases with an increasing number of fresh cases filed on a daily basis. For several reasons, ranging from inadequate strength of Judges to a skewed Judge-population ratio, Courts are facing a docket explosion. As a result, the disposal rate of pending matters cannot match upto the rate at which fresh cases are being instituted. Whatever the reasons are, it is the litigants, the real consumers of justice, who are having to bear the brunt of this huge pendency of cases and delays in dispensation of justice. In the endeavour to promote expeditious settlement of commercial disputes, the legislature had enacted the Commercial Courts, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015, which contemplates establishing of separate commercial courts to hear arbitral disputes, amongst other commercial disputes of a specified value, within a fixed timeframe. But at the end of the day, the legislation for establishing separate commercial courts alone cannot help. What is required is sufficient number of Judges to man such courts.

History and Evolution

In the above scenario, alternate dispute resolution mechanisms are very attractive options. There are five traditional methods of dispute resolution, i.e., arbitration, mediation, conciliation, negotiation and settlements through judicial intervention. The concept of an Alternate Dispute Resolution mechanism is therefore not unknown to India. A palpable example of mediation dates back to the ancient Indian epic, '**The Mahabharata**', where Lord Krishna had donned the mantle of a Mediator and attempted to facilitate a settlement between two branches of the royal family, the Kauravas and Pandavas, in order to prevent a battle for the throne of the Kingdom of Hastinapur. There were several other processes of alternate dispute resolution practiced in ancient India, in one form or another,

like the Panchyati system which dates back to the Vedic times and was formulated predominantly as a primary dispute resolution mechanism in the Indian villages.

Peoples' court or Lok Adalats, which is yet another form of ADR has remained an integral part of our historical past as it conceptualized and institutionalized the mechanism of "Nyaya Panch". The focus of Lok Adalats, that had taken off in Gujarat in the year 1982, has always been on resolution of disputes and summary dispensation of justice, without much emphasis on legal technicalities. Lok Adalats were formalized under the **Legal Services Authorities Act, 1987** and given a statutory status in terms of the mandate of **Article 39-A of the Constitution of India.** Later on, in the year 1992, the Panchayati system was also given a legal status on the introduction of the 73rd Amendment to the Constitution.

These mechanisms have had a major role to play in reducing the load of the courts and providing time-effective and cost-efficient resolution of disputes. On the introduction of MED-ARB, a new dimension has been added to the ADR mechanism. Straying from the beaten track of standalone mediation or a standalone arbitration, "MED-ARB" is hybrid mechanism that offers the litigants a multi-tier dispute resolution mechanism. The expression, "MED-ARB" was first used and made popular by Sam Kageland John Kagelin the context of a notorious nurse's strike in San Francisco in the 1970s[1]. Ever since then, MED-ARB has been used to resolve various types of industrial and commercial disputes, employment disputes, international disputes, and corporate disputes[2] in the western world. It has gained popularity in several countries like Australia, U.K., U.S.A., China and Singapore, though it is at a relatively nascent stage in India.

Mechanism of MED-ARB

The process of "MED-ARB" entails a two-tier system that involves a Neutral individual, who facilitates a settlement between the parties and if there is no voluntary resolution to the disputes or only a part of the disputes are settled, his role terminates and the arbitration clause comes into operation, where the parties are given a choice, depending upon the terms of the agreement, to appoint a new Arbitrator, who would commence the adjudicatory process and pronounce a final and binding award. The other option that the parties can exercise is of involving a Neutral individual, who would combine the role of a Mediator and an Arbitrator for facilitating a settlement between the parties. If they are able to arrive at an agreement on different aspects of the dispute during the mediation process, then he assists them to execute a settlement. But, if some of the disputes remain unresolved, then upon conclusion of the mediation process, the very same Neutral wears the hat of an Arbitrator and adjudicates upon the said issues, followed by a final and binding award.

An essential element of MED-ARB is that like in arbitration, an agreement in writing is a pre-requisite, where mediation is specified as the primary ADR process, sequentially followed by the process of arbitration, in respect of the unresolved disputes. This mechanism has the elasticity to switch between mediation and arbitration and accesses the best features of both the ADR mechanisms. That is why this form of ADR is also called

1 Concordia Law Review, 2017, Volume 2, MED-ARB Adoption in Securities Law Disputes: Advantages and Costs by Hyung Kyun Kwon, Cornell Law School.

2 John T. Blankenship, Developing Your ADR Attitude MED-ARB: A Template for Adaptive ADR, 42 TENN. B.J. 28, 28 (2006)

'Mediation with a Muscle' as it allows the parties to be flexible, but at the end, has an element of arbitration for resolving those disputes, that remain unresolved.

Benefits of "MED-ARB"

The hybrid "MED-ARB" process is an efficient tool of dispute resolution in terms of time and cost. It gives a greater play in the joints to the parties as it combines the voluntary techniques of persuasion as in mediation and if the parties are unable to arrive at an agreement, then the arbitration process is set into motion for issuance of a binding decision. The said process though informal in nature and devoid of any procedural steps, has a fixed timeline for achievement of results. It maintains privacy and confidentiality and gives the disputants access to trained Neutrals. It helps in preservation of business relationships and provides creative business driven solutions. It gives an option to the parties to settle some of the matters from out of several disputed matters, through a negotiated settlement process, followed by the adjudicatory process of arbitration.

"MED-ARB" is a process which does not insist on "one size fits all". It allows for softer and flexible mediation process by exhausting every possible opportunity to achieve a resolution to a dispute, voluntarily and peacefully. If administered properly by competent and ethical Neutrals, it can be transformed into a tailor-made process, that can satisfactorily resolve a wide range of disputes, especially, civil, commercial, industrial and family disputes. This technique has particularly achieved success in disputes relating to banking, contract performance, IPRs, joint ventures, partnership differences, construction contracts, professional liability and real estate.

Pit Falls of "MED-ARB"

"MED-ARB" has attracted criticism from some quarters as it permits the same Neutral who is empowered to act as a Mediator in the mediation process, is privy to confidential communication received from both sides during private sessions, described as CAUCUSES, which may not be admissible in a judicial trial, to subsequently act as an Arbitrator, who remains in possession of such confidential communications which could be misused. It is with the idea of overcoming any apprehension of breach of confidentiality that in some jurisdictions as in Hong Kong, the statute prohibits a single individual to combine the role of a Mediator and Arbitrator. However, the Singapore International Arbitration Centre (SIAC) offers a practical solution where mediation takes place first through a Neutral party and during the course of the said procedure, the arbitration reference is mandatorily halted for eight weeks. If the parties are able to arrive at a negotiated settlement through mediation, then the settlement agreement is given the shape of an arbitral award. In case of no settlement, a separate individual is appointed as an Arbitrator who sets into motion the adjudicatory process through arbitration. The aforesaid sequential process ensures that there is no overlap of the role of a single individual and thereby manages to avoid the pitfall of bias and breach of confidentiality.

Arbitration and Mediation: Shifting Paradigms in India

India is catching up with the international trend of adopting the MED-ARB process as can be gauged from its receptiveness to Mediation and Arbitration, as efficient alternative tools for dispute resolution. The **Legislative Mandate in India** does not have a law

specifically laid down for conducting MED-ARB proceedings, but the provisions of some of the Statutes encapsulate the spirit of MED-ARB. As for example, **Section 89 of the Code of Civil Procedure**, which spells out the various options of alternative dispute resolution that are available and prescribes that if it appears to the court in a pending litigation that there exists an element of a settlement, it may refer the matter to arbitration, conciliation, mediation or a judicial settlement through the Lok Adalat.

In sync with the provisions of the CPC, is **Section 30 of the Arbitration and Conciliation Act, 1996** that recognizes any settlement arrived at between the parties during the pendency of the arbitration proceedings. The said provision empowers the arbitral tribunal to use mediation, conciliation or other procedures at any stage during the course of the arbitral proceedings, to encourage a settlement and if a settlement is arrived at, it can be incorporated in the arbitral award, on agreed terms. A similar procedure has been laid down in Sections **73** and **74** of the Act for undertaking the conciliation process.

There are several important organizations that have made a significant contribution in promoting ADR services on the international platform that includes Permanent Court of Arbitration (PCA), World Trade Organization (WTO), International Chamber of Commerce (ICC), Court of Arbitration for Sport (CAS), United Nations Commission on International Trade Law (UNCITRAL), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission (CIETAC) and Beijing Arbitration Commission (BAC). In India, prominent organizations like FICCI, ASSOCAM, Indian Council of Arbitration (ICA), Indian Institute of Arbitration and Mediation (IIAM) and International Centre for Alternative Dispute Resolution (ICADR) provide specialized services to promote ADR. ICADR, which is working under the aegis of the Supreme Court of India and IIAM, a non-profit arbitral organization offer several ADR procedures for resolving commercial disputes, including arbitration, conciliation, mediation, Med-Arb, Arb-Med, mini-trial etc.

Courts in India have also lent a helping hand in recognizing the process of MED-ARB. Take for example, the case of *Afcons Infrastructure Ltd. And Anr. vs. Cherian Varkey Construction Co. Pvt. Ltd. And Ors.*[3], decided in the year 2010, where the Supreme Court had the occasion to interpret **Section 89** of the Code of Civil Procedure, and held that the tenor of the provisions of Rule 1A of Order 10 of the CPC, which prescribes that after recording the admission and denials, a civil court should direct the parties to a suit to opt for the ADR processes as specified under Section 89 of the Code, shows that it is mandatory in nature, and only in certain recognized excluded categories of cases, may the Court choose not to refer the dispute to an ADR process, while briefly recording the reasons for not resorting to any of the said processes.

In a recent judgment in the case of *Union of India vs. Baga Brothers and Anr.*[4] decided by the Delhi High Court in July, 2017 on examining the dispute resolution section of the contract governing the disputant parties therein that stipulated that arbitration cannot be invoked unless the procedure of conciliation provided as a pre-condition, is resorted to, the Court referred to Section 77 of the 1996 Act and held that the parties ought to take up the agreed procedure for conciliation as provided for in the contract, in a time bound manner and only if the said procedure fails, can they be held entitled to proceed with the

3 (2010) 8 SCC 24

4 MANU/DE/1880/2017 (FAO 387/2017, DATED **07.07.2017**)

arbitration proceedings. Thus the sanctity attached to the contract voluntarily arrived at by the parties that contemplated "MED-ARB", was underscored.

In a decision in the case of *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited*[5], in the year 2016, the Supreme Court has acknowledged the efficacy of a two-tier arbitration procedure under the Institutional rules. The said judgment has reiterated long line of decisions rendered by several courts in the country, accepting the validity of a two-tier arbitration procedure and declared that the same do not violate the fundamentals or the public policy of India. In other words, courts have held that parties agreeing to a second instance of arbitration, is founded on party autonomy, that is the brooding and guiding spirit in arbitration. The very same autonomy would extend to the "MED-ARB" process, which is also a two–tiered one and recognized under the 1996 Act, as long as it is the choice of the parties.

These decisions demonstrate that the process of MED-ARB is gradually gaining momentum in India. One is given to understand that the government is in the process of tweaking the existing arbitration framework in India by proposing to amend the 1996 Act. The Arbitration and Conciliation (Amendment) Bill, 2019 was introduced based on the report of Justice B. N. Srikrishna Committee dated 30th July, 2017, wherein the Committee had made several suggestions to bring about changes in the ADR culture by adopting Med-Arb as an ADR option for its sheer efficiency in terms of time and cost, greater party autonomy, flexibility and privacy along with a regimented timeline for achieving the outcomes. With the passing of the Bill in both the Houses of the Parliament, in the Rajya Sabha on July 18, 2019 and the Lok Sabha on Aug 01, 2019, the Arbitration and Conciliation (Amendment) Act, 2019 has incorporated some key changes in the current statute i.e. the Arbitration and Conciliation Act of 1996.

Conclusion & Future of This New Approach

To conclude, the format of "MED-ARB" is well-suited to the Indian milieu. Unlike several other jurisdictions, India has bestowed upon a settlement agreement, the same status as an arbitral award rendered by an arbitral tribunal under Section 30, Sections 73 and 74 of the 1996 Act. In the Asian context, it has historically been noticed that litigants prefer mediation and conciliation as a mode of dispute resolution over routine litigation in courts. This is also apparent from the fact that "MED-ARB" has been provided for as an option in the laws of many Asian countries like, China, Hong Kong, Singapore, Japan and Taiwan. This hybrid ADR process that is a harmonious amalgam of the conciliatory nature of mediation with the adjudicatory nature of arbitration, strikes a perfect balance between party autonomy and finality of dispute resolution. It incorporates the best features of mediation and arbitration and is essentially founded on the principles of sustaining relationship between the parties and at the same time, effectively resolving their disputes.

5 AIR 2017 SC 185

JUSTICE J.R. MIDHA

Judge, High Court of Delhi

Justice J.R. Midha was appointed as Judge of Delhi High Court on 11th April, 2008. Before elevation, Justice Midha had been practicing before the Delhi High Court, Supreme Court, and other Courts/Forums including MRTP Commission, National Consumer Disputes Redressal Commission, etc. Justice Midha was the Standing Counsel (Civil) of Govt. of NCT of Delhi before the High Court of Delhi from 2006 to March 2008.

From 1989 to 1992, Justice Midha was also teaching at Campus Law Centre, Faculty of Law, Delhi University. He taught various subjects including Code of Civil Procedure, Indian Evidence Act, Transfer of Property Act, Delhi Rent Control Act, Limitation Act, Arbitration Act, Motor Vehicles Act, Court Fees Act, Suit Valuation Act, Indian Registration Act and Indian Stamp Act. Justice Midha also compiled the synopsis and case material on the subjects of "*Pleading and Conveyancing*" and "*Motor Accident Compensation*" for the Campus Law Centre. While teaching, Justice Midha organized a Lok Adalat on Motor Accident Compensation in Campus Law Centre in 1991 in which the compensation was computed by the Law students under his guidance and the computation was given to the Lok Adalat Judges in advance to ensure that the claimants get fair and uniform compensation.

As a Judge, Justice Midha has actively initiated judicial reforms. The notable judgments authored by Justice Midha are as under:-

1. ***Rajesh Tyagi v. Jaibir Singh,*** MANU/DE/0051/2021 – Special Scheme for expeditious settlement of Motor Accident Claims.
2. ***Karan v. State NCT of Delhi***, 277 (2020) DLT 195 (FB) – Guidelines for compensation to victims of crime.
3. ***M/s Bhandari Engineers & Builders Pvt. Ltd. v. M/s Maharia Raj Joint Venture & Ors.***, 2020 (270) DLT 582 - Guidelines for expeditious disposal of execution cases.
4. ***Kusum Sharma v. Mahinder Kumar Sharma,*** 2020 SCC OnLine Del 931 - Guidelines for determination of maintenance in matrimonial matters.
5. ***H.S. Bedi v. NHAI,*** (2015) 220 DLT 179 – Consequences of raising false claims before the Court – Section 209 IPC.
6. ***Ved Parkash Kharbanda v. Vimal Bindal,*** (2013) 198 DLT 555 What is Truth and how to discover it.

Justice Midha has also written books on Motor Accident Claims Compensation and Amendments to the Code of Civil Procedure.

Expeditious Execution of Arbitration Awards: A new way forward

-Justice J.R. Midha

1. Purpose of law is to impart '***Justice***' and adjudication of a dispute culminating into an award does not mean that complete justice has been done unless the benefits of the award have actually reached the litigant. The arbitral award remains a paper decree unless executed by the Courts. Delays and difficulties in execution of arbitral awards not only erode confidence and trust in the justice delivery system but also has a negative impact on ease-of-doing-business standards in the country. Execution jurisdiction therefore deserves special attention and expeditious enforcement of arbitral awards considering that the award/decree-holder has already succeeded in the litigation and holds an award in his favour.

2. The arbitration award does not put quietus to the litigation, rather sometimes it becomes a new lease to another round of civil litigation which is reborn in execution with a vast longevity. Execution of an arbitration award is a difficult task especially when the decree-holder is not aware of the assets of the judgment-debtor. As a result, the execution proceedings keep on lingering indefinitely and at times, the decree-holder is at the mercy of the judgment debtor.

3. The Arbitration and Conciliation Act has been amended number of times to ensure that the arbitration award is passed expeditiously and the Courts' intervention is reduced but no attention has been paid to the expeditious disposal of the execution proceedings. The whole purpose of an expeditious award would be wasted if the execution proceedings remain pending indefinitely in Courts.

4. In *Satyawati v. Rajinder Singh,* (2013) 9 SCC 491, the Supreme Court quoted the *Privy Council's* judgment of 1872 that the '*difficulties of a litigant in India begin when he has obtained a decree*'

and observed that the position has not improved and the decree-holders still face the same problems. The Supreme Court further observed that if there is an unreasonable delay in execution of a decree, the decree-holder would be unable to enjoy the fruits of his success and the entire effort of successful litigant would be in vain. The relevant observations of the Supreme Court are reproduced as under: -

> *"……. In relation to the difficulties faced by a decree-holder in execution of the decree, in 1872, the Privy Council had observed [General Manager of the Raj Durbhunga v. Coomar Ramaput Sing, (1871-72) 14 MIA 605 : 20 ER 912] that: (MIA p. 612)*
>
> > *"... **the difficulties of a litigant in India begin when he has obtained a decree.**"*
>
> *2. Even today, in 2013, the position has not been improved and still the decree-holder faces the same problem which was being faced in the past……*
>
> *xxx xxx xxx*
>
> *12. It is really agonising to learn that the appellant-decree-holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant-plaintiff had finally succeeded in January 1996. As stated hereinabove, the Privy Council in General Manager of the Raj Durbhunga v. Coomar Ramaput Sing, (1871-72) 14 MIA 605 : 20 ER 912] had observed that the difficulties of a litigant in India begin when he has obtained a decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in Kuer Jang Bahadur v. Bank of Upper India Ltd. [AIR 1925 Oudh 448 (PC)] the Court was constrained to observe that: (AIR p. 448)*
>
> > *"**Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights."***
>
> *13. In spite of the aforestated observation made in 1925, this Court was again constrained to observe in Babu Lal v. Hazari Lal Kishori Lal [(1982) 1 SCC 525] in para 29 that: (SCC p. 539)*
>
> > *"**29. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections."***
>
> *xxx xxx xxx*
>
> *16. …… **the position has not been improved till today. We strongly feel that there should not be unreasonable***

delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."

(Emphasis Supplied)

5. Order XXI of the Code of Civil Procedure lays down the procedure for the execution of the decree. Order XXI Rule 1(b) of the Code of Civil Procedure enables the judgment-debtor to directly pay the decretal amount to the decree-holder. Order XXI Rule 1(a) of the Code of Civil Procedure gives an option to the judgment-debtor to deposit the award amount with the Executing Court and give the notice of deposit to the decree-holder under Order XXI Rule 1(2) of the Code of Civil Procedure. Thus, in an ideal situation, the judgment-debtor is supposed to satisfy the award without waiting for the institution of an execution case.

6. If the judgment-debtor does not voluntarily satisfy the award, the decree-holder is compelled to initiate the execution proceedings. If the decree-holder is aware of the assets of the judgment-debtor, the Executing Court attaches the assets at the very threshold of the execution proceedings. The Executing Court thereafter initiates proceedings for sale of the attached assets of the judgment-debtor.

7. If the decree-holder is not aware of the complete assets and income of the judgment-debtor, the Executing Court directs the judgment-debtor to disclose his assets in Form 16A of Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure.

8. Form 16A of Appendix 'E' under Order XXI Rule 41(2) of the Code of Civil Procedure is not exhaustive to ascertain all the assets and income of the judgment-debtor. As a result, the execution proceedings keep on lingering at the mercy of the judgment-debtor.

9. In many countries namely United Kingdom, U.S.A, Canada, Australia, Singapore, Ireland, New Zealand and South Africa, the law prescribes a mandatory comprehensive format of assets, income, expenditure and liabilities to be filed by the judgment-debtor. However, there is no such provision/practice in our country.

10. Delhi High Court, in the recent judgment dated 05th August, 2020 in *M/s. Bhandari Engineers & Builders Pvt. Ltd. vs. M/s. Maharia Raj Joint Venture*, Ex.P.275/2012, considered the *best international practices* with respect to mandatory filing of an affidavit of assets, income, expenditure and liabilities of the judgment-debtor and formulated the formats of affidavits to be filed by the judgment-debtor at the very threshold of the execution proceedings. Delhi High Court also laid down the guidelines for expeditious hearing and disposal of execution cases.

11. The format of affidavit of assets and income of the judgment-debtor is ***Annexure A1***; the format of affidavit of assets and income of a proprietorship firm/partnership firm/HUF/Company /Trust as a judgment-debtor is ***Annexure B1***; and the format of the affidavit of expenditure of the judgment-debtor is ***Annexure C1*** to the aforesaid judgment.

12. The aforesaid affidavits are very comprehensive and are useful to determine whether

the judgment-debtor has means to satisfy the award. In the aforesaid affidavits, the judgment-debtor has to disclose the nature of business/profession, share in business/profession, net worth of the business, number of employees, amount of regular monthly withdrawals, Income Tax, net income, annual turnover/gross receipts, gross profits etc. The judgment-debtor is also required to disclose the income from other sources, namely, agricultural income, rent, interest on bank deposits and investments, dividends, profit on sale of movable/immovable assets, mutual funds, annuities etc. A salaried judgment-debtor has to disclose the particulars of his employment including salary, D.A., commissions, incentives, bonus, perks, perquisites and other benefits, Income Tax, pension and retirement benefits etc.

13. In the aforesaid affidavits, the judgment-debtor is also required to disclose particulars of immovable properties in his name as well as joint names; financial assets including all bank accounts, DEMAT accounts, safety deposit lockers; investments including FDRs, stocks, shares, insurance policies, loans, foreign investments; movable assets including motor vehicles, mobiles, computer, laptop, electronic gadgets, gold, silver and diamond jewellery etc.; intangible assets; garnishee(s)/trade receivables; corporate/business interests; disposal and parting away of properties; properties acquired by the family members, inheritance.

14. The judgment-debtor is also required to disclose whether he has ever been arrested or kept in detention; whether any Court has issued bailable/non-bailable warrants against him; whether he has ever been released on bail/anticipatory bail; whether he has ever been prosecuted and/or convicted; whether he has ever been declared as proclaimed offender/proclaimed person; particulars of all pending litigations, decided/disposed off litigations as well as unsatisfied decrees/awards.

15. The judgment-debtor is further required to disclose his standard of living and lifestyle, namely, credit/debit cards, membership of clubs and other associations, loyalty programmes, social media accounts, domestic helps and their wages, mode of travel in city and outside city, category of hotels for stay, category of hospitals for medical treatment, frequency of foreign travel, frequent flyer cards, brand of mobile, wrist watch, pen, expenditure ordinarily incurred on family functions, festivals and marriage of family members, etc. ***Annexure C1*** requires the disclosure of expenditure on housing, household expenditure, maintenance of dependents, transport, medical expenditure, insurance, entertainment, holiday and vacations, litigation expenses, discharge of liabilities etc.

16. The directions issued by Delhi High Court in *M/s. Bhandari Engineers & Builders Pvt. Ltd.* (supra) are as under:-

> *"55. In execution proceedings, the Executing Court shall direct the judgment-debtor, at the first instance i.e. first date of filing, to file the affidavit of assets on the date of cause of action, date of the decree/award as well as on the date of the swearing of the affidavit in Form 16A of Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure within thirty days. The oral prayer/application of the decree-holder for issuance of such direction shall be sufficient compliance of Order XXI Rule 41(2) of the Code of Civil*

Procedure.

56. *The Executing Court is empowered, at the initial stage itself, to restrain the judgment-debtor from transferring, alienating or disposing of or otherwise parting with the possession of any assets to the tune of the decretal/ award amount except in the ordinary course of business such as payment of salary and statutory dues. The Executing Court shall restrain the judgment-debtor from discharging any financial liability, other than the liabilities of Banks/financial institutions, without the permission of the Executing Court.*

57. *If the judgment-debtor fails to appear before the Court upon service of notice, the Executing Court shall ensure his presence initially by issuing bailable warrants and thereafter, by issuing non-bailable warrants as per law.*

58. *In the event of the default of the judgment-debtor to file the aforesaid affidavit within the stipulated time, the Executing Court shall consider detention of the judgment-debtor in civil prison for the term not exceeding three months under Order XXI Rule 41(3) of the Code of Civil Procedure by directing the decree-holder to deposit the subsistence allowance @ Rs.40 per day per person with the Executing Court for detention of the judgment-debtor. Upon deposit of the subsistence allowance, the Executing Court shall issue non-bailable warrants against the judgment-debtor for his detention.*

59. *Since Form 16A of Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure is not exhaustive to ascertain all the assets of the decree-holder, this Court, in exercise of its powers under Sections 30 and 151 and Order XXI Rule 41 of the Code of Civil Procedure read with Sections 106 and 165 of the Indian Evidence Act and Article 227 of the Constitution of India, has formulated following three affidavits: -*

- *Annexure A1 - Affidavit of assets and income of the judgment-debtor;*
- *Annexure B1 - Affidavit of assets and income of a proprietorship firm/ partnership firm/HUF/company/trust as a judgment-debtor;*
- *Annexure C1 - Affidavit of expenditure of the judgment-debtor.*

61. *The Executing Court shall direct the judgment-debtor, at the initial stage itself, to file an affidavit of his assets and income in the format of Annexure A1 along with documents mentioned therein within thirty days. If the judgment-debtor is a proprietor of a proprietorship firm/ partner of a partnership firm/member of an HUF /Director/Promoter of a company/ Managing Trustee of a Trust, the judgment-debtor be directed to file an additional affidavit in respect of the assets and income of the firm/HUF / Company/Trust, as the case may be, in the format of Annexure B1.*

62. *After examining Annexure A1, the Executing Court may direct the judgment-debtor to file an additional affidavit of his expenditure in the*

format of Annexure C1.

63. *If the judgment-debtor is a Firm/Company/HUF/Trust, the Executing Court shall direct the judgment-debtor to disclose its assets and income in the format of Annexure B1 within 30 days. The affidavit of the Firm/ Company/ HUF/Trust shall be sworn by all Partners/Directors/ Promoters (other than independent/non-executive and nominee directors)/Members /Karta/ Trustees, as the case may be.*

64. *In pending execution cases, if the judgment-debtor has not already filed the affidavit of assets and income, the Executing Court shall direct the judgment-debtor to file the affidavit of his assets and income in terms of this judgment.*

65. *If the facts of the case so require, the Executing Court may, in order to facilitate execution proceedings, direct the parties to make compilation/ extracts from the accounts/other data and present the assets and income in a tabular form, duly supported by an affidavit.*

66. *If any ground for lifting of the corporate veil of a judgment-debtor company is made out as per law, then all the Directors/Promoters (other than independent/non-executive and nominee directors) of the judgment-debtor Company shall be directed to disclose their personal assets and income in the format of Annexure A1.*

67. *The Executing Court shall ensure that the filing of the affidavits by the judgment-debtor is not reduced to a mere ritual or formality. If the affidavits of the judgment-debtor are not in the prescribed format or are not accompanied with the relevant documents, the Court may take the affidavits on record and grant reasonable time to the judgment-debtor to remove the defects/deficiencies and simultaneously act on the information available in the deficient affidavit as per law.*

68. *If any objections are filed raising claims such as HUF character or transfer, agreement to sell, mortgage, tenancy etc. to the property of the judgment-debtor (as existing on the date of the institution of proceedings in which decree was passed), the Executing Court may direct the objector to file a detailed affidavit along with all relevant documents evidencing his claim including subsequent conduct in relation thereto.*

69. *Upon filing of affidavit in Form 16A of Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure and the additional affidavits namely Annexures A1, B1 and C1, the decree-holder shall verify the disclosures made in the affidavits, either himself or through an investigator. In appropriate cases, the Executing Court may order investigation by a Government Agency including a forensic audit, cost of which shall be borne by the decree-holder.*

70. *If the judgment-debtor does not truly disclose all his assets and income,*

the decree-holder is at liberty to serve the interrogatories under Order XI of the Code of Civil Procedure and/or seek production of relevant documents from the judgment-debtor.

71. *In appropriate cases, Court may order interrogatories, discovery, inspection, production of any document and/or order any fact to be proved by affidavit under Section 30 of Code of Civil Procedure.*

72. *The Executing Court shall, thereafter, consider whether the oral examination of the judgment-debtor is necessary under Section 165 of the Indian Evidence Act. If the Executing Court consider it necessary, the Executing Court shall examine the judgment-debtor to elicit the truth. The principles relating to the scope and powers of the Court under Section 165 of the Evidence Act have been summarized in Ved Parkash Kharbanda v. Vimal Bindal, (2013) 198 DLT 555, which may be referred to.*

73. *Sections 51(b), 60 to 64 and Order XXI Rules 41 to 57 of the Code of Civil Procedure contain the provisions for attachment of properties in execution. Before attaching a property, the Executing Court shall ensure that the property does not fall in the list of properties which are exempt from attachment/sale under the Proviso to Section 60(1) of the Code of Civil Procedure. The Executing Court shall ensure the compliance of Sections 60 to 64 and Order XXI Rules 41 to 57 of the Code of Civil Procedure with respect to the attachment of properties in execution of decrees.*

74. *If the judgment-debtor does not satisfy the decree/award despite having means/capacity to pay, the decree-holder has to file an application for his detention whereupon the Executing Court shall issue a show cause notice to the judgment-debtor to show cause as to why he should not be committed to civil prison. The Executing Court shall, upon being satisfied that the judgment-debtor has means to pay the decretal amount or substantial part thereof and has refused or neglected to pay the same, pass an order for detention of the judgment-debtor in civil prison for a period not exceeding three months in terms of Section 58(1)(a) of the Code of Civil Procedure. Even after release from detention, the judgment-debtor shall remain liable to satisfy the decree/award in terms of Section 58(2) of the Code of Civil Procedure. The Court shall follow the procedure laid down in Sections 51(c), 55 to 59 and Order XXI Rules 37 to 40 of the Code of Civil Procedure for detention of the judgment-debtor.*

75. *In appropriate cases, the Executing Court may issue any of the following directions:- (i) Issue notice and direct the Garnishee(s) to deposit in Court the amount due to the judgment-debtor as per law; (ii) Permit the decree-holder to inspect all the assets and the records of the judgment-debtor in the presence of the Local Commissioner to be appointed by the Court; (iii) Direct the auditor of the judgment-debtor company to submit a report with respect to the affairs of the judgment-debtor company; (iv) Permit the decree-holder*

to serve interrogatories on the auditors of the judgment-debtor; (v) Permit the decree-holder to inspect the records of the judgment-debtor with the Income Tax and the other authorities to verify the disclosures made by the judgment-debtor; (vi) Appoint a receiver in respect of the attached properties of the judgment-debtor and (vii) In extreme cases, appoint a Chartered Accountant as a Local Commissioner to inspect all the records of the judgment-debtor and submit a report to the Court with respect to the affairs of the judgment-debtor.

76. *The Executing Court shall pass appropriate order of restitution to reimburse the loss suffered by the decree-holder on account of delay and obstruction in the execution proceedings caused by the judgment-debtor. The Executing Court shall endeavour to place the decree-holder in the same position as he would have had been if the decree had been satisfied soon upon it being passed.*

77. *Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false claims by the judgment-debtor. The cost should be equal to the benefits derived by the litigants, and the harm and deprivation suffered by the rightful person so as to check the frivolous litigations and prevent the people from reaping a rich harvest of illegal acts through Court. The costs imposed by the Courts must be the real costs equal to the deprivation suffered by the rightful person and also considering how long they have compelled the other side to contest and defend the litigation in various courts. In appropriate cases, the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.*

78. *If the judgment-debtor makes a false claim/statement in his/her affidavit, the decree-holder is at liberty to invoke Section 340 Cr.P.C for prosecution of the judgment-debtor under Section 209 of IPC. Whenever a false claim is made before a Court, it would be appropriate, in the first instance, to issue a show cause notice to the judgment-debtor to show cause as to why a complaint be not made under Section 340 Cr.P.C. for having made a false claim under Section 209 of the Indian Penal Code and a reasonable opportunity be afforded to the judgment-debtor to reply to the same. If the facts are sufficient to return a finding that an offence appears to have been committed and it is expedient in the interests of justice to proceed to make a complaint under Section 340 Cr.P.C., the Court need not order a preliminary inquiry. But if they are not and there is suspicion, albeit a strong one, the Court may order a preliminary inquiry. For that purpose, it can direct the State agency to investigate and file a report along with such other evidence that they are able to gather. Once it prima facie appears that an offence under Section 209 IPC has been made out and it is expedient in the interest of justice, the Court should not hesitate to make a complaint under Section 340 Cr.P.C. Reference be made to Sanjeev Kumar Mittal v. State, 174 (2010)*

DLT 214 for principles relating to Section 340 Cr.P.C and H.S. Bedi v. National Highway Authority of India, 2016 (227) DLT 129 for principles relating to Section 209 IPC.

80. *These modified directions/guidelines shall apply to all execution proceedings, such as the execution proceedings under Section 36 of the Arbitration and Conciliation Act; execution proceedings before Motor Accident Claims Tribunals; execution proceedings before the SDM empowered to execute decree/award as arrears of land revenue; execution proceedings before Debt Recovery Tribunals and execution proceedings under Consumer Protection Act.*

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81. *The affidavits formulated by this Court namely Annexures A1, B1 and C1 or such of the information from the affidavits as is considered necessary, can be directed to be filed in any proceedings in which the Court considers it necessary to ascertain the financial capacity or status of a party such as proceedings under Order XXXVIII of the Code of Civil Procedure and proceedings under Section 9 of the Arbitration and Conciliation Act. The Arbitral Tribunals are also empowered to direct a party to file the aforesaid affidavits i.e. Annexures A1, B1 and C1 or such of the information from the affidavits as is considered necessary, in the proceedings under Section 17 of the Arbitration and Conciliation Act to ascertain the financial capacity/ status of a party.*

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83. *The Courts below shall expedite the execution proceedings and shall make an endeavour to decide the execution cases within one year of institution. The Courts below shall send the list of all pending execution cases which are more than one year old, through their District Judges. The list shall contain the name of the case; date of institution; number of hearings that have taken place; whether the judgment-debtor has filed the affidavits in terms of the judgment dated 05th December, 2019 and the reasons for delay in disposal. List be prepared according to the seniority i.e. the oldest case shall be mentioned first. The Courts below shall also send a list of execution cases decided in the last one year. The District Judges shall compile the list of all its Courts and shall send them to the Registrar General of this Court by 31st December, 2020 for being placed before this Court."*

17. The new procedure formulated by Delhi High Court has revolutionized the execution procedure and by strict enforcement of the aforesaid procedure, the execution proceedings can be concluded within a period of one year. It is hoped that the apparition of the observations made by the Privy Council in 1872 that "***difficulties of a litigant in India begin when he has obtained a decree***" would not haunt our legal system anymore.

JUSTICE (RETD.) S.J. VAZIFDAR

Former Chief Justice, Punjab and Haryana High Court

Justice Vazifdar was born on May 4, 1956. He completed school education in the year 1972 from Rishi Valley School, Bombay and graduated from St. Xavier's College, Bombay.

After being awarded an LL.B. degree from Hinduja Law College, Bombay, he got enrolled as an advocate with the Bar Council of Maharashtra and Goa in 1980. Specialising in the field of Civil, Constitutional, Company and Arbitration cases, he had a celebrated term as a legal practitioner in the Hon'ble Supreme Court, various High Courts, Tribunals and District Courts before being sworn in as an Additional Judge of the Bombay High Court on January 22, 2001.

He was appointed as a permanent Judge on January 21, 2003. He assumed charge as the Acting Chief Justice of Punjab and Haryana High Court on December 15, 2014 upon transfer from the Bombay High Court and as Chief Justice of Punjab and Haryana High Court on 07.08.2016.

He is currently heading a three member committee constituted by the National Green Tribunal to decide mining company Vedanta's plea challenging closure of its Sterlite copper plant at Tuticorin.

DIAC
Delhi International Arbitration Centre

New Horizons in Arbitration

-Justice (Retd.) S.J. Vazifdar

Until recently, most conferences and articles on arbitration concentrated on arbitrations generally. They dealt with the benefits of arbitration as an effective alternative to actions in civil courts. There has, however, been no attempt, at least no serious attempt, at exploring the possibility of expanding the fields of arbitration. The time is ripe to explore new horizons in the field of arbitration.

Alternative modes of Dispute Resolution (ADR) have not only been supported but actively encouraged by the Central Government and the State Governments in several ways especially financially and even through legislation. The judiciary has strongly advocated recourse to ADRs. Considering the sustained impetus to arbitration from all stakeholders especially over the past two decades, one wonders how long arbitrations will be grouped in the category of ADR. Many parties refuse to enter into contracts unless the other party agrees to an arbitration clause. To them, arbitration is not an alternative mode of dispute resolution but the Primary Mode of Dispute Resolution. They are willing to negotiate the financial terms, but are uncompromising in their demand for an effective arbitration agreement.

With this environment and with arbitration being firmly entrenched as a desirable mode of resolution of disputes, the time has come to consider whether the fields of arbitration ought not to be increased.

There are certain areas where recourse to arbitration is not permissible. There are areas where there is a doubt as to whether recourse to arbitration is permissible or not. It is necessary now to take a look at these fields and to examine whether it is desirable to have disputes relating to such fields referred to arbitration and, if so, whether it is at all possible to do so.

Before going further, I must enter an important caveat which I did at conferences and seminars when I was a Judge. I have done so even after I retired. I do not express any view on questions of law barring certain obvious and innocuous exceptions. Nor do I voice an opinion on what according to me the law ought to be. This is for a variety of reasons, some of which are obvious. I enter the same

caveat here. However, as far as this article is concerned, it will become obvious that this is also because I have not yet formed an opinion on the issues I have referred to.

It is difficult to refer certain actions in *rem,* such as petitions for winding up of a company, proceedings for insolvency, and proceedings relating to the testamentary and intestate jurisdiction of a Court, to arbitration.

There are also actions where arbitrations are not permissible such as under various rent laws as they involve an element of public policy and exclusive jurisdiction is conferred upon special courts to deal with them. Take for instance Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Rent Act)[1] which confers exclusive jurisdiction upon the Court of Small Causes, Bombay *inter alia* to entertain and try any suit or proceeding of the specified categories between a landlord and a tenant relating to the recovery of rent or possession of any premises or between a licensor and a licensee relating to the recovery of the licence fee or charge.

In *Deccan Merchants Cooperative Bank Limited v. Dalichand Jugraj Jain, (1969) 1 SCR 887*,[2] the Supreme Court held that considering the social objective intended to be achieved under the Rent Act, it is necessary that a dispute between the landlord and the tenant should be dealt with by the courts set up under the Rent Act and in accordance with the special provisions of the Rent Act.

Following this judgment, in *Natraj Studios v. Navrang Studios, (1981) 1 SCC 523*, the Supreme Court held:

> *"17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain courts is pursuant to the social objective at which the legislation aims public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by Special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rents Act cannot be recognised by a court of law."*[3]

It would be interesting to consider whether such actions which are not purely in *rem* in the absolute sense can be referred to arbitration through legislation. The legislation may involve the enactment of a new statute or the amendment of an existing statute. I must once again clarify that I express no opinion as to whether such legislation is possible. Nor do I suggest that it is desirable. If it is possible, it will be for the legislature to decide whether it is desirable or not.

On the one hand, a possible view is that when it comes to a person's dwelling, it is necessary to ensure that he does not give it up except as permitted by a special law. It is necessary to ensure that such persons are not tempted for short term gains to give up their place of residence on grounds of economic compulsion or the attraction of easy returns which provide only short term gains. This could impact not merely on the tenant but also others dependent upon him especially his family.

1 The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Rent Act), Section 28.

2 *Deccan Merchants Cooperative Bank Ltd. v. Dalichand Jugraj Jain, (1969), [(1969) 1 SCR 887].*

3 *Natraj Studios v. Navrang Studios, (1981), [(1981) 1 SCC 523].*

On the other hand, some of the most acrimonious disputes are between landlords and tenants. There are several such disputes crying out for an early and a practical resolution. Both landlords and tenants have suffered enormous difficulties and hardships on account of disputes between themselves. A reference of such disputes to arbitration would almost certainly address these situations effectively.

There are thousands of cases pending in the Small Causes Court at Mumbai alone. There must be many more in other jurisdictions. The Small Causes Court has exclusive jurisdiction to hear disputes under the Bombay Rent Act. Even if 5% of these disputes are referred to arbitration, it would result in a reference of thousands of disputes to arbitration.

When it comes to intellectual property rights, the issue is far more complex. There is a possibility of my dealing with the issue as an arbitrator. I look forward to dealing with the issue in any capacity for it is a fascinating aspect. Various views have been taken by different Courts and at times even by Judges of the same Court. Different countries have approached the topic differently. Views have been expressed equally strongly in favour of and against the possibility as well as the desirability of referring disputes relating to intellectual property rights to arbitration.

The strong divergence of views is illustrated in just one paragraph of a judgment of the Bombay High Court in *Eros International Media Ltd. vs. Telemax Links (India) Pvt. Ltd., 2016 (6) Bom.C.R. 321*.[4] Contending that the defendant infringed the plaintiff's copyright, the plaintiff brought a composite action for injunction and damages. The judgment dealt with the defendant's application under Section 8 of the Arbitration and Conciliation Act, 1996 seeking an order referring the disputes to arbitration in terms of the arbitration agreement contained in the Term Sheet. The defendant contended that there is no specific bar to arbitration or the arbitrability of disputes. The defendant contended that it was altogether too broad a proposition to say that no action under the Trademarks Act or the Copyright Act can ever be referred to arbitration.

The plaintiff, on the other hand, contended that the disputes were inherently non-arbitrable and that the reliefs in infringement and passing off by their very nature do not fall within the jurisdiction of the arbitrator *inter alia* as they are actions in *rem*. The diametrically opposed views of the Court and the counsel for the plaintiff recorded in Paragraph No. 22 of the judgment illustrate what I have to say.

> "22. I find Mr. Dhond's protests, to the effect that the view I am inclined to take would turn the entire edifice of intellectual property law on its head, needlessly alarmist. It will do nothing of the kind. On the contrary, I believe an acceptance of Mr. Dhond's view must result in widespread confusion and mayhem in commercial transactions. We often have complex commercial documents and transactions that routinely deal with intellectual property rights of various descriptions as part of the overall transaction. …….. If Mr. Dhond is correct, then in any of these cases, where intellectual property rights are transferred or, for that matter, in any way dealt with, no dispute arising from any such agreement or transactional document could ever be referred to arbitration, and every single arbitration clause in any such document would actually, in his formulation of it, be void and non-est ab initio. ……. I do not think the world of domestic and international commerce is prepared for the apocalyptic legal thermonuclear devastation

4 *Eros International Media Ltd. vs. Telemax Links (India) Pvt. Ltd., (2016), [2016 (6) Bom.C.R. 321].*

that will follow an acceptance of Mr. Dhond's submission."[5]

There are several nuances on the question of arbitrability of disputes in cases relating to intellectual property rights including actions relating to patents, trademarks and copyrights. In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532*,[6] the Supreme Court dealt with the question of 'arbitrability' of disputes. The Supreme Court held that it is not a rigid or inflexible rule that all disputes *in personam* are amenable to arbitration and all disputes *in rem* are not. Disputes relating to subordinate rights *in personam* arising from rights *in rem* have been considered to be arbitrable.

I have not formed any view on the issue myself. I have referred to the judgments only to indicate that there is a strong divergence of views among Judges and members of the Bar and possibly even among others. A lot of time has been taken and will undoubtedly be taken in Courts and before arbitrators in deciding various issues that arise on the question of arbitrability of disputes relating to intellectual property rights. This would result in a lot of uncertainty at every step. It would substantially affect an early resolution of the dispute on merits. It is essential to bring about some certainty on the issue.

If there is to be a change, I would prefer to see it through legislation as far as possible. Legislation is quicker and if clear, would add to certainty. Litigants would know where they stand enabling them to arrange their commercial transactions accordingly and expend their resources on the merits of their disputes.

The law and rules relating to arbitrability vary from country to country. Some countries even have legislation in this regard. The diversity of rules was highlighted in a study made by the International Association for the Protection of Industrial Property in a summary of 24 National Reports in 1992. A comparative study is not the subject matter of this article. The study and research material is important to indicate the complexity of the issues and the importance of an in-depth study and analysis before undertaking any legislative exercise.

The question of arbitrability of intellectual property rights is however extremely complex involving a consideration of several factors. It would be desirable to have a high level committee go into these aspects and formulate a definitive policy before embarking upon legislation. The issue is not merely legal. The Parliament would also consider whether it is desirable.

I have not even taken the trouble of ascertaining the number of matters relating to intellectual property rights pending in various courts. If even a fraction of them are arbitrable and a fraction of that fraction is actually referred to arbitration, there is bound to be an exponential increase in the number of arbitrations.

I have referred to only two subjects. There are many more. One step at a time. It is neither possible nor desirable to have a comprehensive survey of all such laws and if permissible to make disputes covered by them arbitrable.

Mr. Somasekhar Sundaresan, a leading counsel in the Bombay High Court, has examined in an article the composition of the 17th Lok Sabha. The Constituent Assembly was packed with lawyers. Thirty six percent of the MPs in the 1st Lok Sabha were lawyers. In the previous Lok Sabha, just 7% of the MPs were lawyers. Barely 4% MPs in the present Lok Sabha are lawyers. There is a note of despondency about the prospect of legislation. I would however like to be more optimistic in the belief that legislation in respect of a

5 *Eros International Media Ltd. vs. Telemax Links (India) Pvt. Ltd., (2016), [2016 (6) Bom.C.R. 321].*

6 *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011), [(2011) 5 SCC 532].*

particular topic does not depend on the number of MPs from the related discipline.

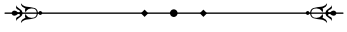
The possibility of an enormous increase in the fields of arbitration will be met with optimism. The actual increase will be welcomed. It must however also be met with caution. An increase in the number of disputes being referred to arbitration would entail a corresponding increase in responsibility. There will be an enormous burden on all the stakeholders to ensure that the quantitative growth in arbitration does not compromise on the quality of the system. It would be of little use to add to the number of arbitrable disputes and to add to the number of disputes referred to arbitration if the same cannot be dealt with efficiently. That would be counter-productive. It would defeat the very purpose of arbitration.

Once the number of arbitrations increase greatly, it would be necessary to have a large number of arbitrators available. I can conceive of a situation where courses would be conducted for training arbitrators. Assistance for training mediators is already in place. There are courses offered by various organizations and institutes. However, it will be necessary to have more intense and comprehensive courses.

There is a saying that the woes of a plaintiff commence after he obtains a decree. Let it not be said that the woes of a successful party in arbitration commence after an award is passed. As arbitration is voluntary, the parties can ensure, to a large extent, the constitution of a suitable arbitral tribunal. The experience of the tribunal and the efficient assistance rendered by the parties and their advocates would, it must be presumed, result in a near perfect award. That award, however, would ultimately be only as good as the efficiency with which it is dealt in a challenge to it under Section 34 of the Act.[7] Even when I was a Judge, I had mentioned that the judiciary would welcome any suggestion to further enhance its ability to deal with the matters relating to arbitration. Especially where proceedings to challenge an award are inordinately delayed for any reason, the purpose of going to arbitration would, to a considerable extent, be defeated. It would benefit the cause of arbitration to enhance the efficiency even of Courts known for their expertise in the field of arbitration.

The importance of taking steps in this regard ought not to be underestimated. With the acceptance of the Shetty Commission Report by the Supreme Court, fresh law graduates enter the judiciary. Some of the brightest youngsters join the judiciary at the early age. If the number of arbitrations is to be increased and even otherwise, it is imperative that the judiciary is equally prepared to meet the challenges which are bound to be posed thereby. I have in a couple of conferences and in my discussions with certain organizations suggested that the judiciary and the organizations ought to work in tandem. Most states in India today have their own Judicial Academies. Newly appointed Judges have to compulsorily go through a year's training in the Judicial Academy. There are also refresher courses. The Judicial Academies have the resources, financial and otherwise, to meet the additional challenge. It is for the persons concerned to tap these resources to ensure the future of arbitration.

It is now for all the stakeholders to explore the possibility of new subjects being added to the list of arbitrable disputes as well as ensuring that we are ready for the same.



7 *The Arbitration and Conciliation Act, 1996 Section 34.*

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Mr. Arvind P. Datar is one of India's leading legal practitioners. He is a prominent senior advocate (designated by the Madras High Court in 2000) with more than 40 years of practice at the Madras High Court and the Supreme Court. He has appeared before the Supreme Court in several landmark cases including the *Madras Bar Association* case; *National Tax Tribunal* case, the SEBI- Sahara case, the *NJAC (Appointment of Judges)* case, the *Privacy* case, *s. 377 IPC* case and the *Jindal (inter-State trade)* cases.

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Delhi International Arbitration Centre

Bilateral Investment Treaties and Taxation

-Mr. Arvind P. Datar

Introduction

Bilateral Investment Treaties (BITs) are, as the name implies, treaties between two countries that are primarily meant to ensure the protection of investments made by investors from one country in the other country. For example, a BIT between India and the United Kingdom will contain provisions whereby investments made by Indian investors in the UK and conversely, by UK investors in India are entitled to protection. The important clauses in any BIT are the clauses pertaining to "Fair and Equitable Treatment" (popularly called the "FET clause") and the clause against expropriation.

Thus, the India-UK BIT assures British investors of "Fair and Equitable Treatment" of their investments in India and also ensures that their investment will not be confiscated without following the prescribed procedure. The significant feature of a BIT is that there is an arbitration clause whereby an investor can initiate proceedings against the State where the investments are made *i.e.,* the Host State before a panel of arbitrators. For example, a British investor who has been subject to retrospective taxation can raise a dispute before an Arbitral Tribunal on the ground that it violates the FET or expropriation clause. Another common area of dispute is based on the "Expropriation Clause" and has been used against measures of confiscation, seizure and attachment taken by the host State. These disputes are known as Investor State Disputes and are popularly referred to as ISDS which stands for Investor State Dispute Settlement. The Host State, in a sense, surrenders its sovereignty, albeit partially, and agrees to disputes being raised by foreign investors that can be adjudicated before an Arbitral Tribunal rather than its own courts. The award passed is binding on the Host

State and, as figures show, the damages can be enormous if the actions of the host State are grossly unfair.

Historical background

With the rapid increase in international trade and commerce after the Second World War, BITs became very popular as they enabled the developed countries to make investments in developing countries with an assurance that their investments were protected and, in the event of any dispute, there was an arbitration clause to resolve it.

It is interesting that the first investment treaty was signed between Germany and Pakistan in 1959. India, on the other hand, signed its first Bilateral Investment Treaty only in March 1994, with the United Kingdom. The economic reforms made in 1991 opened up several sectors and stringent restrictions placed on Foreign Direct Investments (FDIs) were substantially reduced and, in some cases, removed altogether. With increased FDI, the number of BITs signed by India also increased and treaties were signed not only with almost all developed countries but with several developing countries in Asia and Africa as well.

The entire law of Bilateral Investment Treaties is explained in a remarkable book that has been recently published[1] and this article has immensely benefitted from the insights that this book contains. Despite dealing with a legal subject, the book is immensely readable and gives the reader a panoramic and comprehensive view of not only legal aspects of BITs and Foreign Direct Investments (FDIs) but also the economic underpinning of these treaties and India's termination of several of them.

The *White Industries* wakeup call

Very little was known in India about BITs till an award was passed by a Tribunal under the India-Australia BIT in the case of *White Industries v. Coal India Ltd.* White Industries, an Australian mining company, had entered into a contract with Coal India Ltd., a public-sector unit in 1989. The contract contained an arbitration clause which was governed by the ICC Arbitration Rules. Disputes that arose between White Industries and Coal India were referred to arbitration and in May 2002, the ICC Tribunal partly allowed the claim of White Industries amounting to USD 4 million approximately. Coal India filed an application in the Calcutta High Court in September 2002 to set aside this award under section 34 of the Arbitration and Conciliation Act, 1996. At the same time, White Industries filed an application under section 48 of the 1996 Act before the Delhi High Court to enforce the ICC Tribunal award. There were multiple proceedings before the Calcutta High Court, Delhi High Court and the Supreme Court which resulted in a delay of more than *nine years*. While these proceedings were pending before the Indian Courts, White Industries invoked the arbitration clause under the India-Australia BIT for compensation on the ground that India had violated FET clause as it had failed to afford adequate means to enforce a foreign arbitral award as was required by the New York Convention. White

1 *India and Bilateral Investment Treaties,* by Dr.Prabhash Ranjan, Oxford University Press

Industries claimed that it had a legitimate expectation that the New York Convention would be followed and other claims based on expropriation were also made.

The Arbitral Tribunal rejected the pleas of legitimate expectation as well as expropriation. White Industries succeeded only partially on the ground that despite the lapse of nine years, the award had neither been set aside nor enforced. The Tribunal held that India had failed to provide adequate means to enforce the rights of the Australian company. The enormous delay in determining the arbitral and enforcement proceedings was a violation of the India-Australia BIT and damages of A$ 4,755,429 plus interest were awarded.

Apart from the amount awarded, the Tribunal award was an embarrassment because it revealed the huge delays that would occur in the Indian judicial system. Significantly, it also indicated that a foreign company was not helpless and could invoke the FET clause if it was unable to get adequate legal remedies in India.

The decision in *White Industries* was a wake-up call to India as well as foreign investors and resulted in a series of arbitration proceedings under various BITs.

After the *White Industries* case, a series of disputes were raised by foreign companies and these were mainly triggered by the retrospective taxation or termination of contracts by the Government. At present, the following disputes have arisen and are pending under the BITs because of the retrospective amendments by the Finance Act, 2012 that were made to nullify the Supreme Court judgment in *Vodafone International Holdings Ltd. v. Union of India.*[2] The Supreme Court had ruled that the sale of one share of a company registered in Cayman Islands from a Hong Kong Company (transferor) to a British Company (transferee) would not attract capital gains tax in India. It decisively ruled that the sale of shares did not result in acquiring any rights in the underlining assets. The transfer of a share of a foreign company between two non-residents will not amount to transfer of an underlying asset. This was a historic judgment that was expected to have given an enormous boost to foreign direct investments (FDI). But this expectation was belied by the standard practice of nullifying every favorable decision in favour of the assessee. This time, the retrospective amendment resulted in international criticism as the law was amended with retrospective effect from 1.4.62 and resulted in tax liability of billions of dollars not only to Vodafone, but on Vedanta Ltd. and Cairn UK Holdings Limited. Undoubtedly, the retrospective amendment had a negative impact on Foreign Direct Investment (FDI).

Dr. Prabhash Ranjan has also pointed out that two BIT disputes have now been decided in favour of the investor[3]: the first dispute arising under the India-Germany BIT viz. *Deutsche Telekom v. India,* where a German Company had invested in an Indian company and the Government cancelled the contract that related to a provision of telecom/broadband services. The Tribunal held in favour of the German company and has awarded damages. In another case, *Devas v India*, a Mauritius company initiated BIT arbitral proceedings against the government's cancellation of spectrum allocation which had been made

2 (2012) 6 SCC 757

3 Ranjan, *ibid* page 223, 224

to a subsidiary of the Mauritius company for launching of satellites to provide multi-media services to cell phone users throughout India. According to Dr. Ranjan, 10 other arbitrations are currently pending and involve the United Kingdom (4 cases), UAE (2 cases), France (1 case), Mauritius (1 case), Cyprus (1 case) and Netherlands (1 case)[4].

The new model India BIT

In the wake of the adverse arbitral award, India proceeded to terminate more than 50 BITs and between 2011 and 2015, it signed only one BIT with United Arab Emirates (UAE). Most of the terminated treaties are with developed countries. According to the Department of Economic Affairs, India still has 17 treaties with various countries which include Bangladesh, Mozambique, and Sudan. In effect, there is no BIT with any significant partner or developed country at present.

Apart from terminating several BITs, the Government of India proposed a new Model BIT in 2016 but it has not been accepted so far by any significant trading partner country. This is perhaps because it contains several provisions that weaken the very purpose of a BIT. Article 2.4 expressly excludes any taxation measure, compulsory licenses and subsidies and reads as follows:-

> *"2.4 This Treaty shall not apply to:*
>
> *(i) any measure by a local government;*
>
> *(ii) any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision;*
>
> *(iii) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement;*
>
> *(iv) government procurement by a Party;*
>
> *(v) subsidies or grants provided by a Party;*
>
> *(vi) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this provision, a service supplied in the exercise of governmental authority means any service which is not supplied on a commercial basis.*

4 For details, see Ranjan *ibid* pages 224 to 226. The author has indicated the source. UNCTAD n.d. "Investment Policy Hub".

The other serious defect is Article 15 which requires an investor to exhaust all remedies under Indian laws before invoking BIT arbitration. This is what is popularly called "Exhaustion of Remedies" clause, which reads as follows:-

Article 15

Conditions Precedent to Submission of a Claim to Arbitration

15.1 In respect of a claim that the Defending Party has breached an obligation under Chapter II, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within one (1) year from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

Provided, however, that the requirement to exhaust local remedies shall not be applicable if the investor or the locally established enterprise can demonstrate that there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor.

15.2 Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute ("notice of dispute") to the Defending Party.

In simple terms, the foreign investor has to fight a legal battle all the way to the Supreme Court and, if he is still unsuccessful, invoke the arbitration clause. No doubt, there is a proviso which enables an investor to invoke the BIT arbitration provided he can demonstrate that the domestic legal remedies that are available are not capable of reasonably providing any relief. This will be a difficult task to establish.

Apart from these two clauses, there are several other provisions that have drastically limited the scope of the BIT. For instance, the definition of investment excludes several

transactions and the treaty also excludes any dispute pertaining to subsidies or grants provided by one country.

Exclusion of taxation measures:

A major reason for invoking FET clause against India has been "retrospective taxation" or "subjecting investors to extremely harsh taxation measures". The proper remedy would be to ensure that retrospective taxation is avoided. In most progressive democracies, retrospective laws are very rarely made and in several European countries, retrospective laws are actually prohibited. A retrospective legislation is a measure that ought to be avoided by any civilized country unless it becomes necessary in paramount public interest. No other country has made as many retrospective amendments as India has done over the past years. The major apprehension of any foreign investor is that its investment should not be subject to taxation that was never contemplated at the time of the investment and that substantially or completely wipes out the investment of the foreign investor. In India, the validity of retrospective taxation has been upheld and the foreign investor will have no remedy against such measures except to invoke the BIT. The exclusion of taxation from the BIT seriously impairs its efficacy and, it is submitted, will discourage FDI. Article 2.4 further stipulates that it is for the host country to decide whether a dispute amounts to a subject matter of taxation in which event the decision is non-justiciable even if it is arguably wrong.

Exhaustion of Remedies:

Article 15 also results in the model BIT becoming unattractive to other nations. An arbitration clause is, by definition, an alternative method of resolving disputes other than by domestic courts and tribunals. The reason why there is a huge confidence in the arbitration system in most developed countries is that any commercial dispute can be reasonably, quickly and fairly be decided by independent and impartial arbitrators. An award is not permitted to be questioned like a first appeal or revision in a suit. Therefore, the parties conduct their business with care knowing that any unfair conduct or breach of the contractual terms is likely to result in an arbitral award with attendant heavy costs. It would be ironical for any country to stipulate that an arbitration clause can be invoked only after exhausting all the remedies before the Civil Court. That would defeat the very purpose of any arbitration clause. A BIT is intended to promote investment and generate confidence by providing for an independent arbitral tribunal to resolve disputes outside the domestic system of the country wherein the dispute arises committed. By shutting out arbitration until the domestic remedies are exhausted is to virtually shut out the arbitration clause itself. Article 15.2 permits an investor to invoke the BIT arbitration if at least 5 years have passed without any satisfactory resolution of the dispute. It is impractical to expect any investor to wait for five years, spend huge amounts on local litigation and then invoke the arbitration clause.

It is also not clear as to whether a decision of a High Court or the Supreme Court which has become final against an investor can once again become the subject matter of a BIT arbitration. Even if it is theoretically possible to pursue BIT arbitration after exhausting

all legal remedies, enforcement of a BIT award becomes questionable: can the executing court implement the decision of a BIT tribunal when a contrary decision of the Supreme Court has become final ? Needless to add that if the decision of the Supreme Court or High Court is in favour of the investor, there would be no need to invoke the BIT arbitration clause. It is also not clear as to what happens if the dispute is still pending for a period of five years and the BIT clause is invoked eventually resulting in the Supreme Court and the BIT tribunal giving contrary verdicts.

Exclusion of FET Clause

Almost every BIT contains the FET clause. It is perhaps this provision that has often been invoked to question the steps taken by the host State. No doubt, the expression "fair and equitable" has been widely interpreted. Every statutory provision that is intended to have a broad application in practice uses expressions that are capable of elastic interpretation. For example, the power to search is often exercised in various statutes if the concerned officer has "reason to believe" that a violation has taken place. Similarly, the conduct of a company or a citizen is often decided to be valid or invalid based on the subjective satisfaction of a government officer or agency. At the same time, an individual or company can claim relief from such provisions if they can demonstrate that they had "sufficient cause" to believe in a certain state of affairs or that their conduct was "*bona fide* or reasonable". All these expressions are intended to avoid rigidity to a statutes and give certain amount of flexibility that is inevitable and necessary in the ordinary course of commercial life.

The old FET clause which still exists in a vast majority of treaties, reads as follows:

Promotion and Protection of Investment

> *1. Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.*
>
> *2. Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*
>
> *3. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.*

In Rumeli *Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, July 29, 2008. - 46- 254, the Tribunal found the following principles will apply to a FET clause: transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate

expectations.

This clause is now substituted by a new Article 3, titled "treatment of investments" reads as follows:

Treatment of investments

> *3.1. No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law 1 through:*
>
> *(i) Denial of justice in any judicial or administrative proceedings; or*
>
> *(ii) fundamental breach of due process; or*
>
> *(ii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or*
>
> *(iii) manifestly abusive treatment, such as coercion, duress and harassment.*

It will be seen that Article 3.1 substantially narrows down the FET clause. Article 3.4 has a further provision for exhausting local remedies.

BIT and Taxation

Taxation measures have also been considered as violative of certain provisions of the BIT. As mentioned above, some of the major disputes now pending against India before the BIT Tribunals relate to retrospective taxation made by the Union of India. Indeed, taxation measures have been the subject matter of several BIT disputes the world over. In an outstanding article published in the Virginia Tax Review[5], titled *"Investor-State Arbitration in International Tax Dispute Resolution - A cut above dedicated tax dispute resolution*", Julien Chaisse has summarized various BIT disputes that have arisen in the context of taxation. The article gives statistical details of approximately 32 Tribunal awards involving taxation and it is interesting that 15 of the awards were against the host country while the assessees lost the case in the remaining disputes. Therefore, there is no evidence that BIT Tribunals are either pro-assessee or pro-State. The awards are often balanced and take into account not only the interests of the investor but also the interests of the host State. By way of illustration, I have referred to the facts and the reasoning of five BIT awards, two of which are against the investor while the others are against the State.

Awards against the investors:

(i) *Paushok v. Mongolia* [Russia–Mongolia BIT, 2007 – Award dated April 28, 2011]

Mongolia has large gold reserves and three Russian companies set up their subsidiaries for the mining of gold. Investments were made in 1997 when the price of gold was approximately USD 320 per ounce. In a few years, it exceeded USD 500

5 35 Va. Tax Rev. 149

per ounce and Mongolia imposed a 68% Windfall tax (WFT) on Profits (WPT) when gold was sold above the price of USD 500 per ounce. The three Russian investors - *Sergei Paushok, CJSC Voskteknefteg*az, and *CJSC Golden East* – filed an investment case against Mongolia claiming that these measures constituted a breach of their legitimate expectations and violation of their right to a Fair and Equitable Treatment (FET) under the Russia-Mongolia Bilateral Investment Treaty (BIT).

The Arbitration Tribunal dismissed the investors' accusations against Mongolia, stating that in countries which were in their early stages of development, investors cannot expect that tax rates will not increase. It also disagreed with the investors' reasoning that the levy imposed was excessive and dismissed claims that the penalties for employing foreign workers was excessive and arbitrary. The Tribunal emphasized that different considerations would arise if the WFT was retrospective.

However, the Tribunal did rule that Mongolia's Central Bank seizing gold reserves of Mr. Paushok's company constituted a violation of investors' entitlement to FET under the BIT.

(ii) *EnCana Corporation v. The Republic of Ecuador.* [LCIA Case No. UN3481 – Award dated February, 3, 2006]

EnCana, a Canadian company, entered into a participation contract with Petroecuador (a state–owned corporation of Ecuador) to undertake exploration for and production of oil in Ecuador. The Servicio de Rentas Internas (SRI / national tax administration) had accepted the reimbursement of VAT on goods and services which the company used for production of oil for export, but later suspended reimbursement and decided to demand return of money already reimbursed.

EnCana requested arbitration, alleging that this action constituted a breach of Canada-Ecuador BIT. Ecuador objected to the jurisdiction of the arbitral tribunal, asserting that entitlement to reimbursement of VAT falls under taxation measures set forth in Article 12(1) of the BIT.

Article 12 provided (1) that "*Except as set out in this Article, nothing in this Agreement would apply to taxation measures*" and the exception was that the Treaty would apply to "*a claim by an investor that a tax measure of a Contracting party is in breach of an agreement between the Central Government authorities of the contracting parties*" (paragraph (3), and that Article 8, concerning expropriation, may also apply to tax measures (paragraph (4)).

The Tribunal held that the term "tax measures" in question should be interpreted pursuant to its ordinary meaning in the context of the Treaty and admitted as follows: the relevant measures are [i] measures to be taken under the law; [ii] "taxes" include not only direct taxes but also indirect taxes such as VAT; [iii] decisions regarding the amount of tax or reimbursement also fall under "measures"; and [iv] whether relevant measures fall under "tax measures" is not a matter of economic effect but operation of law.

The Tribunal further held that, even though the application of rules on VAT by SRI was inconsistent as claimed by claimant, relevant measures were taken by tax

officials in conformity with related laws and were also subject to a court hearing and, therefore, they fell under "tax measures". It was further held that this case was not a claim regarding breach of the BIT since it did not fall under what was prescribed in Article 12, paragraph (3) because that expressly excluded taxation measures. Hence, the respondent State did not violate the treaty, except for Article 8 concerning expropriation, and concluded that the Tribunal does not have jurisdiction over this case. Despite ruling in favour of Ecuador, it is interesting to note that the Tribunal directed that the respondent State pay the arbitration costs.

Awards against the Host States:

(i) *Occidental Exploration & Production Company v. Republic of Ecuador* [LCIA Case No.UN3467 – Final Award dated July 01, 2004]

Occidental Exploration & Production Company (OEPC/Occidental) had a long-standing commercial relationship with Petroecuador and its predecessor. Until 1999, the OEPC was a mere service provider to Ecuador; it received a fee and was reimbursed for purchases it made on Ecuador's behalf for provision of exploitation activity.

In 1999, however, OEPC obtained the exclusive right to carry out exploration and exploitation of hydrocarbons in Block 15 and assumed virtually all of the costs for doing so. It also had to pay VAT on any expenses it incurred. In return for its obligations under the contract, it received a percentage of the oil, which it was permitted to export.

In 2001, the Ecuadorian authorities took the position that OEPC's contract took account of the VAT paid and, in effect, had compensated OEPC VAT liability. Therefore, OEPC was not entitled to VAT refunds. Resolutions were issued denying the right to refund. OEPC disagreed with such an interpretation.

According to the applicable BIT, a breach of expropriation article occurs only if deprivation rises to a level that represents a significant part of the investment. In this case, the Tribunal did not find that substantial economic deprivation had occurred. However, there was a violation of National Treatment (NT) because the claimant, a foreign company, had been treated in a less favourable manner than other domestic exporters e.g., banana and palm oil exporters. There was also a violation of FET because, even if there was no VAT obligation under international law, there was an obligation not to alter the legal and business framework of an investment.

The Tribunal interpreted the FET standard to require the "stability of [the] legal and business framework," and it emphasized that "the relevant legal question under international law was not whether there was an obligation to refund VAT, but whether the legal and business framework met the requirements of stability and predictability." The Tribunal also noted that the FET standard is objective and does not depend on whether or not respondent acts in good faith.

The Tribunal concluded that "the framework, under which the investment was made and operates, had been changed in an important manner by actions adopted by Servicio de Rentas Internas/SRI and that "the tax law was changed without

providing any clarity about its meaning and extent, and the practice and regulations were also inconsistent with such changes." It thus concluded that Ecuador breached its obligation to accord FET.

(ii) *Yukos Universal v. Russia* [ECT, 2005 – Award dated July 18, 2014]

The biggest arbitral award was made in July, 2014, against Russia for USD 50 billion. Yukos Universal, an oil company, grew rapidly and was on course to becoming the fourth largest private oil producer in the world after their proposed merger with the Russian oil company Sibneft in 2003. The facts show that Yukos sold oil to companies situated in off-shore tax havens such as Cyprus, Gibraltar, the Isle of Man and Switzerland. These entities would then sell oil to other countries at higher rates. The allegation was that the profits were thus shifted to the tax havens and would be subjected to very little or no tax. In 2003, Russian Federation started re-assessment proceedings and questioned the validity of the sales of oil to "shell companies" in tax havens. This re-assessment led to a demand of more than USD 24 billion. But Russia did not stop with the re-assessment. It took various measures against Yukos which eventually lead to its bankruptcy within three years. Thus, from being one of the largest private owned oil companies in the world in 2002, it became bankrupt in 2006 and was struck off the register of the Registrar of Companies of Russia, in November, 2007. Russia also launched criminal prosecution against Yukos Universal, its directors and employees. The Tribunal held that the measures taken by the Russian Federation has violated the relevant investment treaties not only of the FET clause but also expropriation. The arbitration proceedings went on for 10 years and resulted in an award of 615 pages passed by the Permanent Court of Arbitration. The facts do show that the action taken by Russia was excesive, harsh and disproportionate.

(iii) *Senor Tza Yap Shum v. Republic of Peru* [China – Peru BIT, 2005 – Award dated July 07, 2007]

In 2002, Mr. Tza Yap Shum established TSG with a $400,000 investment. TSG purchased raw fish, delivered the fish to third-party factories to process into fish meal, and then exported the finished product. Sales reached $ 20 million per year. In 2004, SUNAT, the Peruvian tax authority, conducted a routine audit of TSG after TSG had requested sales tax refunds. During tax audit, SUNAT decided that TSG had not properly declared the amount and value of raw materials it had purchased, which, SUNAT believed, meant that TSG had under-declared sales as well. SUNAT issued a new tax assessment based on a "presumed basis" of $ 4 million.

TSG did not agree with this assessment. Shortly after audit, SUNAT also took so-called "interim measures" to enforce tax assessment that had been imposed to secure money for the Treasury. All banks in Peru were directed to retain any funds related to TSG passing to them and to redirect such funds to SUNAT.

TSG commenced proceedings in Peru to have the tax claim lifted. An appeal to SUNAT was rejected, although the amount of back-taxes was reduced. TSG's challenge before Peruvian Fiscal Tribunal was rejected as well. By 2005, TSG had to commence debt

restructuring and, soon, the company stopped operations.

TSG then started arbitration procedures under the BIT. The Tribunal determined that interim measures taken by SUNAT did in fact amount to expropriation. Further, it concluded that interim measures significantly interfered with the operation of TSG, that TSG depended entirely on letters of credit from its overseas customers being properly processed through Peruvian banks.

The Tribunal held that SUNAT imposed interim measures in an arbitrary manner, that it did not respect the internal rules and guidelines for its own interim measures (which state that measures taken are exceptional, need to be justified and accompanied by evidence, and that efforts must be made to mitigate harm to taxpayer's business), and that SUNAT's regulators did not make any effort to verify whether these rules were followed.

The upshot was that the interim measures were ineffective. The only real result of the measures was that TSG could no longer operate. Almost no cash was actually seized. Once the Tribunal decided that SUNAT's bank blocking had indeed led to expropriation of TSG, the amount of damages had to be determined.

TSG had asked for $ 25 million, which was based on discounted future profits of the company. Although international law does recognize this calculation method, the Tribunal found it inappropriate in this case. It noted that TSG owed a lot of debt, was operating in a high-risk industry and was already beginning to lose market share in 2004. The Tribunal decided that damages should instead be calculated without taking possible future profits into account, and should be mostly based on adjusted book value of company. This resulted in compensation of $786,000, much less than what the claimant had sought.

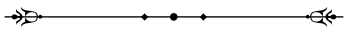
Conclusion

India's signing of several BIT in the 90's coincided with a spectacular increase in FDI. The liberalization of the economy in 1991 resulted in many joint ventures as well as wholly owned subsidiaries being set up in India. Although there is no direct correlation between the existence of a BIT and FDI, it is undoubtedly an important factor that will weigh with any investor who decides to set up a business in India.

The policy behind the present model BIT is to emphasize India's sovereignty and perhaps to declare that the Indian State and its domestic courts and tribunals will be the final arbiter of any dispute that may arise. Undoubtedly, it is India's decision to decide the extent to which it is willing to cede its sovereign powers and permit an Indian tribunal to decide disputes that may arise between the investor and the host State *i.e.* India. But a country that sign bilateral investment treaties with a FET clause and without an "exhaustion of local remedies" clause is really assuring investors that the legal and administrative system in that nation works fairly and equitably and investors will not be subject to any kind of prejudicial treatment or economic harm.

But it will be difficult to attract FDI with a BIT that is sovereign-centric rather than investor

friendly. It is a choice that every country has to make. It is submitted that the need of the hour is more foreign investment if the 'Make in India' target is to come true and if India has to become $5 trillion economy. A single set back in the *White Industries* case should not be a ground to completely terminate treaties with important trading partners. There is a serious need to rethink the Model BIT particularly when after three years, not a single country of any worthwhile consequence has signed our model BIT; it is indeed time for introspection and consider whether it would be worthwhile to draft an investor friendly BIT as existed before and that still prevails amongst developed countries. India must think and act like a developed country and boldly welcome foreign investments.



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Mr. N.L. Rajah graduated in law from Madras Law College. He enrolled in 1986 as an advocate. And joined the chambers of Mr. S.Govind Swaminadhan former Advocate general of Tamilnadu. He was designated as a Senior Advocate of Madras High Court in the year 2016.

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He is a Founding Director of the Nani Palkhivala Arbitration Centre, a Centre recognised by the Madras High Court to render administrative assistance in arbitration matters. He is also a trustee of the Palkhivala Foundation. He is the Member of Heritage Committee of the Madras High Court as also the Arbitration Committee of the Madras High Court. He was amember of the expert committee of the Law Commission of India to suggest changes to Arbitration and Conciliation Act and also a consultee to Law Commission on Commercial Courts Act. He was a member of Justice D.P.Wadhwa Committee appointed by the Supreme Court of India for study of effectiveness of Public Distribution System in Tamil Nadu.

Modification of Arbitration Awards by Civil Courts

-Mr. N.L. Rajah

One of the main objectives of the UNCITRAL (United Nations Commission on International Trade Laws) was to bring the law relating to arbitration and conciliation on to a common and uniform global platform. Much of the spirit and soul of UNICITRAL has therefore been attempted to be fused into provisions of the Arbitration and Conciliation Act, 1996. While it must be conceded that uniformity in matters relating to mercantile law, both in substance and in form is an ideal to be pursued, variations to suit national requirements is inevitable. One of the significant aspects where this is most pronounced is in the power of civil courts to modify an award passed by the arbitrator. This article seeks to briefly highlight the international scenario, the Indian law on this issue and how much judgments of Indian courts have been in line with the law.

Modification of awards in other jurisdictions

The Madras High Court in *Gayatri Balaswamy vs. ISG Novasoft Technologies Ltd.*[1]*(this decision has not been set aside by an appellate bench in ISG Novasoft Technologies Limited v. Gayathri Balusamy 2019 (5) L.W. 409 but has been merely modified)* had occasion to examine the international practice relating to modification of awards by civil courts in some detail. Justice V. Ramasubramanian of the Madras High Court (as he then was) in his judgment in the above matter sought to bring together the international practice on the issue, to facilitate better understanding of the aspects involved. He therefore examined in great detail the laws of five major jurisdictions i.e.; England, the United States (Federal Law), Canada, Australia and Singapore on the issue of power of court to modify awards.

1 *2015 (1) ARBLR 354 (Madras*)

Holding up the laws of England for closer scrutiny on the issue he held:

> "***40.*** *The English Arbitration Act, 1996 categorizes the powers of the Court in relation to an award, into three types. They are (i) challenge to an award on the question of substantive jurisdiction, under Section 67, (ii) challenge to an award on the ground of serious irregularity affecting either the Tribunal or its proceedings or the award, under Section 68, and (iii) appeal to the Court on a question of law arising out of an award, under Section 69.*

After analyzing in detail, the ambit of each of the provisions set out above, the Court went on to hold:

> ***"42.*** *In other words, the power of the Court to set aside the award in whole or in part, is available in all the three Sections, namely 67, 68 and 69. But, the power to vary the award is available only in Sections 67 and 69 when the challenge is on the question of substantive jurisdiction or when it is an appeal on a question of law. In a case falling under Section 68 of the English Arbitration Act, 1996, challenging the award on the ground of serious irregularity, there is no power to vary the award."*

As regards Australia, the Court held:

> ***43.*** *Insofar Australia is concerned commercial arbitration is governed by two distinct statutory regimes. The first is state based and it regulates domestic arbitration. The second is Federal and it regulates international arbitration. The International Arbitration Act, 1974, was amended in 2010, with the object of giving effect to UNCITRAL Model Law. Part VII of the Act provides for "recourse against the award", the very same expression used in Section 34 of the Indian enactment. Section 34 of the International Arbitration and Conciliation Act, 1974, as amended in 2010, is in pari materia with Section 34 of the Indian Arbitration Act, 1996, with only one exception. Section 34(1) of the Australian Act states that recourse to the Court against an arbitral award may be made either by way of an application for setting aside or by way of an appeal under Section 34-A. Under the UNCITRAL Model Law, there is no provision for appeal. Therefore, the Indian Act of 1996 also does not contain a provision for appeal. However, as we have seen earlier, Section 69 of the English Arbitration Act provides for an appeal on a question of law. Similarly, the International Arbitration Act, 1974 of Australia contains a provision for appeal on a question of law under Section 34-A. Under Sub-section (7) of Section 34-A of the Australian Act (which is in pari materia with Section 69(7) of the English Arbitration Act), the Court has the power, in an appeal, either to confirm the award or vary the award or remit the award or set aside the award in whole or in part. Therefore, if Australian Courts go by the rule of literal interpretation, the Australian Courts would not have the power to vary or modify an award, if what comes up before them is only an application for setting aside the award under Section 34 and they would have the power to modify or vary the award if what comes up before them is an appeal on a question of law under Section 34-A.*

Canadian law on this issue was explained as below in the judgment -

> ***"44.*** *Insofar as Canada is concerned, they have the Commercial Arbitration Act of 1985. The Act contains only about 11 Sections and 2 Schedules. Under Section 5(1) of the Act, a Code known as "Commercial Arbitration Code" has the force of law in Canada. The Code applies in relation to matters, where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental Corporation, a crown Corporation or in relation to maritime or admiralty matters. Schedule I to the Act contains the Commercial Arbitration Code, which is entirely based upon the UNCITRAL Model Law. Article 34 of the Code is nothing but a re-production of Article 34 of the Model Law. Therefore, Article 34 of the Commercial Arbitration Code of Canada also uses only the very same expressions, namely "recourse to a Court" and "set aside".*

The United States (Federal law) were explained as follows :-

> ***"45.*** *Insofar as United States is concerned, there is the Federal Arbitration Act of 1925, which was codified in 1947 and amended in 1954, 1970, 1988 and 1990. This Act contains three interesting provisions. The first is in Section 9, which enables the Court to confirm the award, if the parties have an agreement to have such a confirmation from a specific Court. The second provision is in Section 10. Under Section 10, the United States Court in and for the District wherein the award was made, is conferred with the power to vacate the award upon the application of any party to arbitration, if the award was procured by corruption, fraud or undue means, or if the arbitrators were guilty of misconduct either by refusing to postpone the hearing or in refusing to hear relevant evidence or where the arbitrators exceeded their powers. There is one more interesting aspect to Section 10. Under Clause (b) of Section 10, an award may be vacated even upon the application of a person other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the conditions laid down therein are satisfied.*
>
> ***46.*** *The third provision in the Federal Arbitration Act, which is of significance is Section 11. Under Section 11, the United States Court in and for the District wherein the award was made, can make an order modifying or correcting the award upon an application of a party to the arbitration, under three contingencies, namely (a) where there was an evident material miscalculation of figures or evident material mistake in the description of a thing, person or property, (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision, and (c) where the award is imperfect in the matter of form not affecting the merits of the controversy. The last portion of Section 11 of the Federal Arbitration Act, 1925, requires re-production and hence, it is extracted as follows:*
>
> "*The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.*"

Therefore, it appears that the power of the Court under Section 11 to modify or correct the award is available only for the purpose of giving effect to the true intent of the award and to promote justice.

The Singapore position attracts a little more detailed examination in the Judgment -

The Court after taking note of the provisions of Section 47, 48, 49 and 51 of the Singapore Arbitration Act 2001 held :

> "***48.*** *A careful look at the above provisions of the Singapore Act would show that a Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act. Section 48 provides for setting aside of an award and section 49 provides for an appeal against an award on a question of law. It is interesting to note that section 48 which empowers the court to set aside an award is almost identically worded as section 34 of the Indian Act and it speaks only about setting aside of an award. But section 49 which provides for a remedy of appeal, empowers the court, under sub-section (8) even to vary the award. Therefore, one may tend to think that in an original application to set aside an award under section 48, the Court cannot vary the award, though in an appeal under section 49, it can vary the award. But this conclusion available on a plain reading of the provisions, is dispelled by section 47 which speaks about setting aside, varying, remitting etc. As if to reiterate such a conclusion, section 51, which is made applicable to both sections 48 and 49, speaks of varying an award, under sub-section (2) of section 51. Therefore, sections 47 and 51(2) of the Singapore Act, make it amply clear that the power to set aside includes a power to vary the award.*"

After having considered the global practice in detail the Court goes on to conclude

> "***51.*** *Therefore, in my considered view, the expression "recourse to a Court against an arbitral award" appearing in Section 34(1) cannot be construed to mean only a right to seek the setting aside of an award. Recourse against an arbitral award could be either for setting aside or for modifying or for enhancing or for varying or for revising an award. The expression "application for setting aside such an award" appearing in Section 34(2) and (3) merely prescribes the form, in which, a person can seek recourse against an arbitral award. The form, in which an application has to be made, cannot curtail the substantial right conferred by the statute. In other words, the right to have recourse to a Court, is a substantial right and that right is not liable to be curtailed, by the form in which the right has to be enforced or exercised. Hence, in my considered view, the power under Section 34(1) includes, within its ambit, the power to modify, vary or revise.*"

The analysis of the global practice in the above judgement is enlightening and useful. As regards the final conclusion of the Court, unfortunately different High Courts in India have been taking differing stands. The Supreme Court's position on this aspect also has not thrown light on the proper approach to be adopted by courts below as the succeeding paragraphs will establish.

Arbitration and Conciliation Act, 1996: modification of awards

As regards the power to modify an arbitral award under the provisions of the Arbitration and Conciliation Act, 1996 admittedly there is no explicit power to modify an award. Section 33 of the Arbitration and Conciliation Act, 1996 gives guidelines with respect to correction and interpretation of an award including passing an additional award

supplementing the initial award passed by a tribunal. The scope of setting aside an award under Sec.34 is far more stringent than it was under Section 30 or Section 33 of the Arbitration Act, 1940. Section 39 of the Arbitration Act of 1940 also allowed the courts to modify and correct an award.[2] This is starkly different from the act of 1996 which only authorises courts to set aside an arbitral order. Section 33 of the 1996 Act provides that the Tribunal may correct the award within 30 days from the receipt of award. If the Tribunal finds the request for correction to be reasonable, then it shall make a correction or interpretation of a specific point or part of the award within 30 days of the receipt of request. However, if the Tribunal deems it necessary it can also extend the period of time within which it will make correction in the Award or interpretation of the Award.

However, beyond the provisions of Sec.33 there is no provision applicable to modification of awards and it is to be borne in mind that even Sec.33 deals with only the power of the Arbitral Tribunal to modify and not the court.

Arbitration awards set aside partially

Indian courts have generally operated on the basis that setting aside part of the award partially does not amount to modification of the award. In R.S.Jiwani Vs. Ircon International Ltd[2a]. a full bench of the Bombay High Court has held that the Court in terms of Section 34 of the Arbitration and Conciliation Act 1996 takes within its ambit power to set aside an award partly or wholly depending on the facts and circumstances of the case. It also added that proviso to Section 34 (2) (a) (iv) has to be read *ejusdem generis* to the main section as in cases falling in that category there would be an absolute duty on the court to invoke the principle of severability where matter submitted to arbitration can clearly be separated from the matters not referred to arbitration and decision thereupon by the Arbitral Tribunal. While deciding the above case a full bench of the Bombay High Court has taken into account the various views expressed on the issue by the Supreme Court and High Courts. The Supreme Court till date has not sounded a different note on the issue and it may therefore be safely assumed that setting aside an award partially would not amount to modification of the award.

The Supreme Court and modification of awards

The Supreme Court is yet to rule authoritatively on the power of a civil court to modify an award passed by the arbitral tribunal. It is also perplexing to note that the Supreme Court has modified awards or put its stamp of approval on modification of awards by lower courts without expounding on the statutory authority on the basis of which this has been done. The Apex Court in *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*[3] has endorsed and accepted the modification of award by the trial court. In that case the award was challenged under Section 34 of the Arbitration Act. The trial court by the judgment, allowed the petition in part. In an appeal under Section 37 of the Act, the said judgment of the trial court was set aside and the award was upheld in entirety. However, the Apex Court upheld the trial court's order of partial modification.

2 Section 39(1) in The Arbitration Act, 1940 Indiankanoon.org, https://indiankanoon.org/doc/1666609/ (last visited Jun 8, 2019)

2a *(2010)* 1 MahLJ 547

3 *(2006) 4 SCC 445*

In *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors.*[4] the Supreme Court held *".. the court cannot correct the errors of the arbitration. It can only quash the award leaving the parties free to begin arbitration if desired."* Having held so the Court in the very same case went on to modify the interest awarded. In *Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India*[5], also the Supreme Court modified the award without expounding on the basis of exercise of such power.

> In *Hindustan Zinc Limited v. Friends Coal Carbonisation*[6] the Supreme Court put its seal of approval on modification of the award by the District Court while hearing a petition to set aside the award.
>
> In *Oil and Natural Gas Corporation Ltd. Vs. Western Geco International Ltd* curiously the Supreme Court held that if the arbitrators failed to make an inference which should have been made, or have made a prima facie wrong inference, then "*the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified"*

In *Vedanta Ltd. v. Shenzen Shadong Nuclear Power Construction Co. Ltd., (2009) 11 SCC 465* quite astonishingly the Hon'ble Supreme Court allowed Vedanta's appeal against the order of a division bench of the High Court, and modified the award in an international commercial arbitration observing that the dual interest rate awarded was exorbitant, unjustified, unwarranted and penal.

The Hon'ble Supreme Court affirmed the power vested in courts to reduce the interest rate awarded by an arbitral tribunal. In this context the Court relied on the judgements delivered in *Food Corporation of India v. A.M. Ahmed (2006) 13 SCC 779* and *Manalal Prabhudayal v. Oriental Insurance (2009) 17 SCC 296* as well as the Delhi High Court's decision in *Indian Oil Corporation v Lloyds Steel Industries (2007) SCCOnline 1169*. However, it is important to observe that not only were these judgments rendered prior to the 2015 amendments to the Arbitration Act, but also pertained to awards passed in domestic arbitrations. Even conceding that the Supreme Court's interference in *Vedanta* may have been well intended, still the legal position is that the amended Arbitration Act categorically provides against such judicial interference in the case of international commercial arbitrations.

In the judgement in ***Vedanta's*** case also the Supreme Court does not discuss the source of its powers under the Arbitration and Conciliation Act, 1996 to modify an award.

In the absence of specific statutory sanction in the Arbitration and Conciliation Act 1996 permitting modification of awards, one can only assume that the Hon'ble Supreme Court passed such orders in exercise of powers under Art. 142 of the Constitution which enables it to do complete justice between the parties. However, if that were the position it would still lead to two further questions to be answered. First, since even Art. 142 does not enable the Supreme Court to act in variance with enacted law, before exercising powers under Art 142, should the Court not have examined its powers under the Arbitration and Conciliation Act, 1996, to modify awards in any manner? Second, if it is Art. 142 powers that are being exercised to modify awards then how does the Supreme Court put its seal

4 *(2006) 11 SCC 181*
5 *AIR 2003 SC 1581*
6 *2006 (4) SCC 445*

of approval of judgements by lower courts modifying awards since such courts are not vested with Art.142 jurisdiction? These aspects require further examination.

High Courts and modification of awards

As stated earlier High Courts have varied diametrically in their decisions as to whether an award could be modified by civil courts. We have already seen the dicta of the Madras High Court in **Gayathri Baluswamy's** case holding categorically that the power to modify an award is inherent in the provisions of Sec.34. Some High Courts have adopted this line of thought while others have disagreed. Curiously enough, both interpretations have also been adopted by the same High Court too.

The Bombay High Court

In *Union of India (UOI) vs. Arctic India,*[7] a Single Judge of the Bombay High Court observed in Paragraph No. 27 as under:

> *" After considering the facts and circumstances of the case and the provisions of Section 34 of the Arbitration Act, I am of the opinion that the quantum of claim as granted and the quantum of the claim as rejected can be gone into as there is a case of perversity or illegality made out to the limited extent as observed above. In Krishna Bhagya Jala Nigam Ltd. v. Harischandra Reddy and Anr.*[8]*the Supreme Court has modified the award on the point of interest. In following case the Supreme Court has modified the award even on merit and restricted claim and interest. Therefore, as there is no bar under the act to modify the award and in the fact and circumstances of the case I am acceding to the submission made by the counsel appearing for the petitioner. Only for the above extent, the award stands modified for the above reasons."*
>
> However, the very same Bombay High Court in *Pushpa P. Mulchandani and Ors. vs. Admiral Radhakrishin Tahilani and Ors.*[9] refused to modify an award holding, " *the intention of the legislature, therefore, was clear not to confer on the court power to modify the award*."

Further the Bombay High Court observed in *Anupam Engineer, Mumbai Vs. Indian Oil Corporation Ltd., Mumbai*[10] that Arbitral Award can be modified by the Court under Section 34 of the Arbitration Act by referring to various Supreme Court Judgments. Further, in *Union of India Vs. Sagar Thermit Corporation Ltd.*[11] by referring to *R.S. Jiwani (M/s.), Mumbai v. Ircon International Ltd., Mumbai,*[12], it was held by a the Single Judge that the award can be modified and/or some of the claims can be retained/maintained keeping in view the full bench Judgment.

As stated earlier the Apex Court in *Mcdermott International Inc v. Burn Standard Co Ltd.*[13] held that power of court under Section 34 was only to set aside the award. Notwithstanding

7 *2007 (4) ARBLR 524 (Bom)*
8 *AIR (2007) SCW 527*
9 *2001 (2) ARBLR 284 (Bom)*
10 *2010 (2) Mh.L.J. 632*
11 *2011 (2) Mh.L.J. 845*
12 *2010 (1), Mh.L.J. 547*
13 *2006 (5) SLT 345*

the same in *Axios Navigation Co. Ltd. vs. Indian Oil Corporation Limited*[14] the Bombay High Court held, the Court has power to modify the claim and/or the award under Section 34 of the Act.

The Delhi High Court

In *Union of India v. Modern Laminators*[15] the learned Judge of the Delhi High Court read into Section 34 of the 1996 Act, the "obvious error" and "the slip rule" found in Section 15 of the 1940 Act. The Court went on to hold:

> *"In my opinion, the power given to the Court to set aside the award, necessarily includes a power to modify the award, notwithstanding absence of express power to modify the award, as under the 1940 Act... If the powers of the Court under S. 34 are restricted to not include power to modify, even where the court without any elaborate enquiry and on the material already before the arbitrator finds that the lis should be finally settled with such modification and if the courts are compelled to only set aside the award and to relegate the parties to second round of arbitration or to pursue other civil remedies, we would not be servicing the purpose of expeditious/speedy disposal of lis and would be making arbitration as a form of alternate dispute resolution more cumbersome than the traditional judicial process."*

However, In *Puri Construction P. Ltd. and Ors. Vs. Larsen and Toubro Ltd. and Anr*.[16] the Delhi High Court observed:

> *"118…in light of the dictum in McDermott International Inc. and the difference in provisions of the 1940 Act and the present Act, this Court holds that the power to modify, vary or remit the award does not exist under Section 34 of the Act."*

Recent judgment of the Delhi High Court in *Angel Broking Ltd. v Sharda Kapur*[17] held that modification of an arbitral award does not fall within the purview of section 34 of the Arbitration and Conciliation Act, stating that the purpose of enacting the 1996 was to remove the interference of the Court into arbitration proceedings.

The Allahabad High Court

The Allahabad High Court in *U.P. State Handloom Corporation Ltd. v. Asha Lata Talwar* has adopted an identical stand as that of the Delhi High Court's observation in *Puri Construction P. Ltd. and Ors. Vs. Larsen and Toubro Ltd. and Anr*.[18]

The Gujarat High Court

The Gujarat High Court in *Gujarat Mineral Development Corporation Ltd. vs. Simplex Infrastructure Limited*[19] observed as under:

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14 *2012 (2) ALLMR 881*

15 *2008 (3) ARBLR 489*

16 2015 SCC OnLine Del 9126.

17 *LNIND 2017 DEL 15689*

18 *Ibid*

19 *MANU/GJ/1067/2017*

"11.7.1. ... The challenge to the said award has been set up under Section 34 of the Arbitration Act about the deficiencies in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the Arbitral Award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in subsection (4) of section 34. The view which we are expressing is supported by the decision of the Hon'ble Supreme Court in the case of McDermott International Inc. vs. Burn Standard Ltd. reported in (2006) 11 SCC 181."

The Madras High Court

A recent judgement of the Madras High Court spells out the Court's current position on modification of awards. In the case of *J.K.Fenner India Limited Vs. Neyveli Lignite corporation Ltd* (O.P.No. 252 of 2014 decided on 20.5.2020) a Single Judge of the High Court following her earlier judgement in the *Sterlite Technologies* case held as follows:

"25. In the judgment in Sterlite Technologies I had, considered the various judgments pronounced by the Hon'ble Supreme Court regarding the scope of interference under Section 34 of the 1996 Act commencing from the judgment of the Hon'ble Supreme Court reported in 2006 (11) SCC 181, Mc Dermott International Inc vs. Burn Standard Co, Ltd wherein the Hon'ble Supreme Court had struck a note that the 1996 Act cast only a supervisory role where the court was only called upon to test the fairness of the award and was not called upon to correct the errors of the Arbitrator. This judgment had been followed in many of the later judgments. Thereafter I had considered the judgments post the Amendment to the 1996 Act vide Act 3 of 2016 and relying on the judgment of the Hon'ble Supreme Court in Ssangyong Engineering vs. National Highways Authority, I had observed that in view of the language of the judgment in Ssangyong Engineering vs National Highways the Court exercising jurisdiction under Section 34 of the 1996 Act cannot interfere with the findings of the arbitral award. Further since modifying the award in that in O.P.No.252 of 2014 case would amount to re appreciating the evidence as vital evidence has been overlooked by the learned Arbitrator therein, I had only set aside the award on the ground of patent illegality without reversing the same award.

26.A Division Bench of this Court in Judgment reported in 2019 (5) L.W. 409 [ISG Novasoft Technologies Limited v. Gayathri Balusamy] held as follows:

"A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the Award of the Arbitrator if it is contrary to the material evidence adduced by the parties."

27. In the instant case the learned Arbitrators had after elaborately considering the evidence upheld the right of the claimant to refund of the retention money and the only ground on which the learned Arbitrators have denied interest is on the ground that the amount became payable only by virtue of the award which is per se erroneous. Taking into consideration the

judgments of the Hon'ble Supreme Court in G.C. Roy, http://www.judis.nic.in O.P.No.252 of 2014 N.C. Budharaj, Indian Hume Pipe Co. Limited and Hyder Consulting (UK) Limited as also the division bench judgement of this Court in ISG Nova soft- Technologies Limited and applying the principles thereon to the case of hand I am of the view that the claimant is entitled to interest @ 9 % p.a from 01.03.2004 (the date on which the respondent had taken over the LHS till the date of award and from the date of award till date of payment at 18 % p.a. as held by the Hon'ble Supreme Court in Hyder Consulting (UK) Limited at paragraph 61, particularly in the light of the learned Arbitrators after examining the evidence on record coming to the conclusion that the retention was wrong. Therefore, this Court is not called upon to once again appreciate the evidence."

Conclusion

The Supreme Court is yet to rule authoritatively on whether Civil Courts have powers to modify an arbitral award. As we saw earlier, a passing observation in *Mcdermott International Inc v. Burn Standard Co Ltd*[20] holds that courts do not have the power to modify, whereas an equally fleeting observation in *Oil and Natural Gas Corporation Ltd. Vs. Western Geco international Ltd*[21] suggests that they do have such powers. However, both are but passing references with nothing in the judgments to denote that the Supreme Court has reached such conclusions after an in-depth analysis of the provisions of the Act. A power to modify an award is a very significant power and the litigants are entitled to know whether this is available to civil courts. Predictability of the law is a core asset of law and it cannot be left to conjunctures.

There is no uniformity in the approach of High Courts on this issue either as we saw earlier.

If one of the underlying principles of arbitration law is "least intervention of courts" then one would agree with the judgment of the Supreme Court in *Mc Dermott* case that civil courts would not have the power to modify awards. Then again, if interpretation is to follow the "literal text" rule there is nothing in Sec 34 to suggest that Parliament reposed power in civil courts to modify arbitral award. Above all this is the real danger as to how lower courts would exercise a power to modify an award if it were to be vested in them without statutory provisions to guide the exercise of such power which Sec.34 in its current form plainly does not possess.

If such powers are vested and remain unregulated and unchanneled (as they are likely to be in the absence of statutory guidelines or judicial mandates) it may well convert setting aside petitions to full blown appeals that has a potential to eat into the very vitals of the arbitral regime.

"Least intervention by courts" and "Party autonomy" are fundamental governing principles of arbitration law. Interestingly, in other jurisdictions even the strength of the "Party autonomy" principle, has been found to be very inadequate to dislodge the "Least intervention by courts" principle

20 (2006) 11SCC 181

21 AIR 2015 SC 363

The US Supreme Court has categorically held that parties to a contract cannot extend by agreement the grounds to set aside an award in the Federal Arbitration Act, for example, to create a right of appeal. In the Hall Street case[22], the US Supreme Court held that parties were not free to expand the limited statutory grounds for setting aside awards through private contracts. The arbitration agreement between the parties in that case provided that if either party were dissatisfied with the outcome of the arbitral award, it could appeal to a designated US court. The relevant arbitration clause provided:

> *[t] he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The court shall vacate, modify or correct any award; (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.*

The Supreme Court held that the parties could not by contract widen the Federal Arbitration Act and agree to their own procedure under which courts may set aside an arbitral award on the basis of an arbitrator's legal error.

A similar approach was taken by the New Zealand Court of Appeal in Methanex Motunui Ltd. Vs. Spellman[23] when it held that Article 34 of Schedule 1 of New Zealand's Arbitration Act (which corresponds to the identically numbered Model Law provision): is expressed in exclusionary terms: only grounds upon which a court may interfere with an award in review proceedings. Accordingly, it was held that it is not open to the parties to a submission to arbitration to confer, by contract a more extensive jurisdiction on the court for instance to review for factual error.

The Supreme Court of India in Enercon Vs. Enercon GmBH held that "Least intervention by courts" was a uniformly accepted principle which is reflected in Section 5 of the Indian Arbitration Act. Therefore, the approach of courts must be that they will avoid an interpretation that tends to widen powers of the court to interfere with an award. Under the repealed 1940 Act three remedies were available against an award – modification, remission and setting aside. While enacting the Arbitration and Conciliation Act 1996, the Parliament sought to make a conscious departure from the existing law. An explicit power to modify an award having been denied by the legislature the same must not find an entry into the arbitral regime through judicial interpretation.

Greenberg, Kee and Weeramantry in their treatise "International Commercial Arbitration: An Asia- Pacific Perspective" approve this approach when they state that the provisions of the UNCITRAL Model Law does not afford the court reconsideration of the award on the merits.

It is desirable, that at the earliest the law relating to power of civil courts to modify awards is decided conclusively by the Supreme Court of India after considering all aspects involved.

22 *Hall Street Associates Vs. Mattel Inc* 552 U.S. 576 (2008)

23 [2004] 3 NZLR 454

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Judicial review of preliminary jurisdictional rulings: Lessons from recent developments in Singapore

-Ms. Wendy Lin and Ms. Brunda Karanam

Introduction

Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") provides that the arbitral tribunal may rule on its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules that it *has jurisdiction* as *a preliminary question*, any party may request the seat court to decide the matter, within 30 days after having received the ruling on jurisdiction.[1]

It is apparent therefore that Article 16(3) of the Model Law confines challenges on preliminary jurisdictional rulings to those where the issue has been answered by the tribunal in the *positive*. It should be noted, however, that for Singapore-seated arbitrations, Singapore has expanded the availability of such challenges to both *positive* and *negative* jurisdictional rulings by way of Section 10 of the International Arbitration Act ("**IAA**")[2]. This is an important aspect to be borne in mind for parties considering Singapore as the seat of arbitration.

This paper deals with the other considerations that one should bear in mind when designating Singapore as the seat, by considering two recent pronouncements of the Singapore Courts in their review

1 Article 16(3), Model Law.

2 Sections 10(2) and 10(3), IAA.

of preliminary jurisdictional rulings. The first concerned the perennial conundrum of the extent of the 'choice of remedies' available to a party, while the second addressed the approach to be adopted in determining the seat of the arbitration and in turn the applicable law of an arbitration agreement, which had a significant impact on whether the tribunal had jurisdiction over the dispute.

(i) 'Choice of remedies'

It is well-established that the Singapore Courts would apply a *de novo* standard of review while reviewing jurisdictional rulings of the arbitral tribunal and consider the issue afresh.[3] *Further*, the Singapore Courts are able to undertake this *de novo* review not only where there is a challenge to a tribunal's preliminary jurisdictional ruling but also in certain subsequent occasions notwithstanding that no such challenge had been made. This was confirmed by the Singapore Court of Appeal ("**SGCA**") in the landmark judgment of *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 ("***Astro***"). In that case, the SGCA affirmed the applicability of the 'choice of remedies' doctrine in Singapore – observing that this "…(w)as not just a facet of the Model Law enforcement regime; (but was)…the *heart* of its entire design"[4] – and held that the concerned respondents, which did not avail themselves of the *active* remedy of challenging a preliminary jurisdictional ruling under Section 10 (3) of the IAA, were not precluded from subsequent recourse to the *passive* remedy of resisting enforcement of the award on the same jurisdictional ground(s).

In short, *Astro* made clear that a party has a 'choice of remedies', and may elect either to challenge a preliminary jurisdictional ruling under Section 10(3) of the IAA or wait for the award to be rendered and resist enforcement on the same jurisdictional ground(s) (in the event it lost on the merits in the arbitration) – *provided* however that the party has not waived the right to do so. On the latter point, the SGCA noted *inter alia* that the concerned respondents had explicitly stated in their defence that nothing therein should be construed as an acceptance of the tribunal's jurisdiction and that their rights in that regard were expressly reserved,[5] and concluded there was no waiver on the part of the respondents. *Astro* therefore served as a useful reminder to parties which choose not to exercise their active remedy of challenging a preliminary jurisdictional ruling, to ensure that they do *not*, whether expressly or impliedly, *waive* the jurisdictional objection and their right to challenge the same in the future, and to expressly make that clear in the course of the arbitral proceedings.

Are there any other exceptions to a respondent's right to a 'choice of remedies'? In *Astro*, the SGCA was of the "tentative view" that the "…position (of choice of remedies) *might* not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Article 34".[6] In other words, while the Court was of the view that

3 *See PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 ("***Astro***"); *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536.

4 *Astro* [65].

5 *Astro* [203].

6 *Astro* [132].

a party which did not exercise its active remedy of challenging a preliminary jurisdictional ruling under Section 10 of the IAA was not precluded from exercising the passive remedy of resisting enforcement on jurisdictional ground(s), it left open the issue of whether the position might be different if the party wanted to raise the same jurisdictional ground(s) in setting aside the award under Article 34 of the Model Law. The SGCA recently had the opportunity to revisit this issue in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33 ("***Rakna Arakshaka***").

In *Rakna Arakshaka*, the award-debtor (RALL) had applied to set aside the award pursuant to *inter alia* Article 34(2)(a)(iii) of the Model Law, contending that the tribunal lacked jurisdiction. The High Court dismissed RALL's application as it was of the view *inter alia* that under Section 10(3) of the IAA and Article 16(3) of the Model Law, RALL had to challenge the order within 30 days of receiving the notice of the ruling on jurisdiction, and by failing to do so, RALL could not thereafter rely on the same jurisdictional challenge in subsequent setting aside proceedings in the seat court, even though it had refrained from taking any further part in the arbitral proceedings.[7]

On appeal, the SGCA reversed the decision of the High Court.[8] The SGCA observed that while the decision in *Astro* was by an enforcing court and constituted *one exception* to the preclusive effect of Article 16(3) of the Model Law, the issue in *Rakna Arakshaka*, which concerned a non-participating respondent applying to set aside the award before a supervisory court on a jurisdictional ground, constituted *another exception*[9]. Specifically, the Court held that "…neither Article 16(3) of the Model Law nor Section 10 (of the IAA) should be construed so as to prevent **a respondent who chooses <u>not</u> to participate in an arbitration because he has a valid objection to the jurisdiction of the tribunal** from raising that objection as a ground to set aside such tribunal's award".[10] On the facts, the Court decided that the award in question contained decisions on matters that were beyond the scope of submission to the arbitration, and set aside the award.[11]

Interestingly, the SGCA went on to observe the following:

> **The position is quite different where the respondent (as in *Astro Nusantara*) having failed in its jurisdictional objection then participates in the arbitration**. **By doing that, the respondent would have contributed to the wasted costs and it is just to say to such a respondent that he cannot then bring a setting aside application outside the time limit prescribed in Art 16(3) though he can continue to resist enforcement.** But a respondent who chooses not to participate is not in any way contributing to any wastage of costs – that is entirely a matter for the claimant. We see no reason why such a respondent should

7 *Rakna Arakshaka* [32].

8 RALL had appealed against the decision of the High Court on the jurisdictional ground and public policy ground. (*Rakna Arakshaka* [36]).

9 *Rakna Arakshaka* [53], [54].

10 *Rakna Arakshaka* [74] (emphasis added).

11 *Rakna Arakshaka* [96].

> not be allowed to apply to set aside the award after it has been made, if indeed the Tribunal had no jurisdiction to make that award.[12]
>
> We are of the view that the preclusive effect of Art 16(3) does not extend to a respondent who stays away from the arbitration proceedings and has not contributed to any wastage of costs or the incurring of any additional costs that could have been prevented by a timely application under Art 16(3).[13]

It is therefore clear that the decision in *Rakna Arakshaka* was confined to the situation where a respondent chose not to participate any further in the arbitration after the tribunal's positive jurisdictional ruling as a preliminary question. As for a respondent that chooses to continue with the arbitration and has thus contributed to wasted costs of the arbitration, it appears the Court would consider that it would not be able to avail itself subsequently of the active remedy of applying to set aside the award, although following from *Astro*, it can continue to resist enforcement on the same jurisdictional ground(s).[14]

What this means is that a respondent which has lost on a jurisdictional challenge would have to make a *strategic decision* as to whether to continue to participate in the arbitration and if so, whether to challenge the preliminary jurisdictional ruling (for if not, it may be left only with the choice of resisting enforcement on that jurisdictional ground, assuming there are no other grounds to set aside the award). It is suggested that a respondent which has lost on the preliminary jurisdictional challenge but intends to continue participating in the arbitration may well wish to file a challenge under Section 10(3) of the IAA, and then apply to the Court to keep the matter in abeyance until the final award is rendered, so as to preserve all its available options.

(ii) Choice of law analysis – proper law of an arbitration agreement and the importance of the seat of the arbitration

The IAA of course only applies to international arbitrations seated in Singapore which brings us to the sometimes thorny issue of ascertaining the seat of an arbitration. In the recent decision of *BNA v BNB and another* [2019] SGCA 84 ("***BNA***"), the SGCA had the opportunity to consider this issue, in a rather unusual context where the issues of the proper law of an arbitration agreement and relatedly the tribunal's jurisdiction, turned almost entirely on the same.

In *BNA*, the contract under which the dispute arose ("**Takeout Agreement**"), was governed by the laws of the People's Republic of China ("**PRC**"), and had an arbitration clause which provided for arbitration before the Singapore International Arbitration Centre ("**SIAC**") in Shanghai. The relevant clause read as follows[15]:

> *ARTICLE 14: DISPUTES*
>
> *14.1 This agreement shall be governed by the laws of the People's Republic of*

12 *Rakna Arakshaka* [75] (emphasis added).

13 *Rakna Arakshaka* [77].

14 *Rakna Arakshaka* [75].

15 *BNA v BNB and another* [2019] SGHC 142 ("***BNA* HC decision**") [3]; *BNA* [12].

> *China.*
>
> *14.2 With respect to any and all disputes arising out of or relating to this Agreement, the Parties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such* ***disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules.*** *The arbitration shall be final and binding on both Parties.* (Emphasis added).

The plaintiff challenged the jurisdiction of the tribunal on the grounds that the arbitration clause was invalid as PRC law, being the law of the arbitration agreement, prohibited a foreign arbitral institution from administering an arbitration seated in the PRC or which arose from a purely domestic dispute[16]. A majority of the tribunal ruled that the governing law of the arbitration agreement was Singapore law and PRC law was irrelevant, and therefore, it had jurisdiction over the dispute.[17]

The plaintiff filed an application before the Singapore High Court under Section 10(3) of the IAA challenging the positive jurisdictional ruling of the tribunal.

Three-stage inquiry

While there was a dispute between the parties as to the governing law of the arbitration agreement, the parties were agreed both before the High Court and the SGCA that the following three-stage inquiry as set out in *BCY v BCZ* [2017] 3 SLR 357 ("***BCY***") (relying on the framework set out by the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102[18]) should be adopted in determining the proper law of an arbitration agreement (the *"**BCY framework***")[19]:

> As applied to an arbitration agreement, the three-stage inquiry asks the following three questions: First, have the parties *expressly* chosen the proper law of their arbitration agreement? Second, have the parties *impliedly* chosen the proper law of their arbitration agreement? Finally, with what system of law does their *arbitration agreement* have its closest and most real connection? …If the parties *have not* expressly chosen a proper law for their arbitration agreement but *have* expressly chosen a proper law for their substantive contract, in the absence of any indication to the contrary, that it is a strong indication at the second stage of the three-stage inquiry that they have impliedly chosen the same law to be the proper law of their arbitration agreement…[20]

Applying the *BCY* framework, the High Court held that the express choice of PRC law as

16 *BNA* [15].
17 *BNA* [16].
18 *BNA* [45].
19 *BNA* HC decision [16]; *BNA* [33], [34].
20 *BNA* HC decision [17].

the governing law of the underlying contract did not amount to an express choice of law for the arbitration agreement.[21] The High Court then went on to the second stage of the framework, and held that the starting point was that the proper law of the arbitration agreement was PRC law (the law of the substantive contract), but this was displaced by the law of the seat, Singapore law.[22]

In this regard, the High Court first considered that while the arbitration agreement provided for disputes to be submitted to the SIAC for arbitration "in Shanghai", this could not be regarded as a specific mention of the "seat" of the arbitration (as distinct from the venue of the arbitration), bearing in mind that Rule 18.1 of the SIAC Rules 2013 provided that in the absence of a contrary agreement by the parties or a contrary determination by the tribunal, the seat of any arbitration under the SIAC Rules would be Singapore.

The High Court further noted that the "…ultimate objective of the three-stage inquiry… (was) to give effect to the parties' intention, and the starting point of the second stage inquiry could thus be displaced if "…the parties' arbitration agreement (would) be invalid under the proper law of the substantive contract".[23] The High Court therefore concluded that Singapore law, as the law of the seat, would displace the implied choice of PRC law as the governing law of the arbitration agreement.[24]

On appeal, the SGCA agreed with High Court that the parties had not made any express choice of law for the arbitration agreement; the choice of PRC law as the governing law of the substantive contract being instead a "strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary".[25]

Turning then to the second stage of the *BCY* framework, the SGCA also agreed that the governing law of the substantive contract would be the starting point, although this implied choice could be displaced.[26] The question therefore was whether there was anything to displace the parties' implied choice of PRC law. In this regard, the SCGA pertinently noted that such an inquiry was only "…relevant *if* the law of the seat (were) materially different from the law governing the arbitration agreement…"; this meant that the phrase 'arbitration in Shanghai' "would…have a significant impact on this inquiry".[27]

As to that issue, the SGCA agreed with the view (as supported by a number of authorities) that where parties have specified only one geographical location in an arbitration agreement, and even more so (as in the present case) where the parties expressed a choice for "arbitration in [that location]", that location should most naturally be construed as a reference to the parties' choice of seat. The SGCA concluded therefore that the natural meaning of the phrase 'arbitration in Shanghai' was that Shanghai was the *seat*

21 *BNA* HC decision [86].
22 *BNA* HC decision [111].
23 *BNA* HC decision [115].
24 *BNA* [31].
25 *BNA* [56], [59], [61].
26 *BNA* [62].
27 *BNA* [63].

of arbitration[28] (and there were "…no contrary indicia to point away from this natural reading").[29]

As the law of the seat and the parties' implied choice of proper law of the arbitration agreement were one and the same, namely, PRC law, the question of whether the implied choice of PRC law should be displaced by the law of the seat in order not to nullify the parties' intention to arbitrate did not arise and the SGCA did not go on to consider the third stage of *BCY* framework.[30] Interestingly, given the SGCA's findings that Singapore was not the seat of the arbitration, this meant that the Singapore Courts had no supervisory jurisdiction over the arbitration in the first place, and any decision by the Singapore Courts in that regard would not bind the tribunal. The SGCA therefore did not (as it could not) rule on the jurisdictional challenge, making instead a declaration that Singapore was not the seat.[31] This left the issue of the tribunal's jurisdiction to be determined by the PRC Courts as the seat court, if the parties chose to pursue the matter further.

The ruling in *BNA* highlights the importance of parties clearly designating their agreed seat of arbitration (by using words such as "the seat of the arbitration shall be…") in the arbitration agreement. The parties should also consider expressly incorporating the law governing the arbitration agreement *if* they intend for this to differ from the law of the substantive contract. In doing so, the parties should exercise caution in ensuring that the proper law of the arbitration agreement does not invalidate the arbitration clause itself.

Conclusion

Choice of seat is one of the most crucial decisions in the conduct of an arbitration. It is advisable that parties undertake a thorough analysis of various factors, including the role played by the seat courts, before choosing a seat. It is also recommended that the choice of seat be made explicit while drafting the arbitration agreement so as to avoid ambiguities where the task of designating the seat is left to the tribunal or the court (similar to the situation in *BNA*).

As stated earlier, one of the aspects to be considered when choosing Singapore as a seat is that the parties will have an opportunity to seek review of *both* positive and negative jurisdictional rulings before the seat courts. The Singapore Courts have also consistently upheld the *de novo* standard of review for jurisdictional rulings, and the concept of 'choice of remedies' doctrine – both of which provide added (but perhaps unwelcome) flexibility to a party in deciding how best to deal with a jurisdictional challenge.

28 *BNA* [65], [66], [67], [69], [94], [96], [103].
29 *BNA* [94].
30 *BNA* [94].
31 *BNA* [97].

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Delhi International Arbitration Centre

An Enigma of Interest in Arbitration

-Ms. Payal Chawla

The grant of interest is a seemingly uncontroversial subject. Although the contentious issues surrounding interest are few, it is mystifying that the same issues have confounded the debate on interest, literally, from time immemorial.

A Brief History of Interest

Both, interest and the debate surrounding it, are historical. Interest pre-dates money[1]. The aversion to interest can be traced back to usury. Usury was typically seen as '*extorting an unreasonable rate for money*'[2]. Usury laws were founded as a defense to the economic exploitation of the poor. Thomas Acquines famously said it is '*illicit to accept a price for the use of money loaned*'[3]. Most ancient civilizations provided for usury laws, including Roman law and Jewish law, influences of which traversed into Christian Europe, China as well as India. In fact, the '*earliest record of laws dealing with interest in Ancient India date back to 2000-1400 BC*'[4].

Interestingly, the '*law relating to interest in Ancient India*' had '*an admirably high degree of sophistication and development*'. In ancient times, Vasistha laid down rules with regard to rate of interest according to which the rate of interest depended on the risk taken by the creditor. Unsecured debt carried a higher rate of interest as compared to a secured debt; exceptional risk permitted high rate

1 A History of Interest Rates (John Wiley & Sons 2017, 4th edn.) - Sidney Homer and Richard Sylla.

2 Tomlins Law Dictionary

3 St. Thomas Aquinas, quoted by Thomas F. Devine in Encyclopedia Americana, Vol.27, Page 824.

4 'Interest in Arbitration', Matthew Secomb, para 2.09

of interest; in certain instances, it was permissible to charge interest even in absence of a definite contract. Failure to pay debt within the defined period would invite interest from expiry of the period. In the absence of a defined period, the creditor could, after '*the expiry of a specified interval (six months according to Narada, and a year according to Vishnu)*', charge interest at the legal rate. Katyayana, however, recommended that interest should not run until there had been a previous demand. Vijnaneshwara propounded that where there is no interest provided for, interest would still be payable but from the date of demand.[5]

The incipience of democracy in Athens also saw the '*rise of sophisticated systems of credit and security [...] However historical prejudices*'[6] against interest continued. Aristotle remained the strongest and most influential voice against interest. Practical considerations surrounding the enhancement of trade in the eleventh century began to question usury, which was posing to be a hindrance to the continuance of commerce without credit. '*In 1215, the Magna Carta placed limits on usury*'[7] and in 1220[8] the modern expression 'interest' came into being. The Renaissance saw the emergence of several economic theories justifying interest[9]. As economic justifications gained acceptance, usury laws came to be modified and replaced by modern interest legislations worldwide.

Despite legislations relating to interest, the contentious interplay between usury and economic compulsions continued to dominate the debate on interest, the effect of which can be seen in arbitral awards and judgements worldwide, including India. The discourse on interest is although no longer on whether interest should exist or not – interest is here to stay, the discussion is limited to rates of interest, types of interest, periods of interest - but the omnipresence of usury continues to loom in the shadows. The most recent example in India came in 2018, where the Supreme Court observed, '*the rate of interest must be compensatory as it is a form of reparation granted to the award-holder; while on the other it must not be punitive, unconscionable or usurious in nature*'.[10]

Interest in Arbitration

While there are several legislations that deal with interest, in regard to arbitration the primary provision is s.31(7)[11] of the Arbitration and Conciliation Act, 1996 ('ACA'). The

5 The source of this material for the above paragraph is 'History of Interest and Usury' (Chapter 2), 63rd Report by the Law Commission of India

6 para 2.13, 'Interest in International Arbitration', Matthew Secomb; OUP 2019

7 *Ibid,* Para 2.31

8 *Ibid,* para 2.32

9 '*Productive Approach to Interest Theory*' of Adam Smith, which in essence was '*money will be borrowed and interest paid, so long as the return that can be earned on the borrowed funds exceeds the interest rate. Interest was, therefore, paid because income could be derived from the use of money*'. There was also the theory of "*Time Preference*' enunciated by Euqen Bohm – Bewerk in 1880s according to which – '*worth of a sum of money presently held is greater than the worth of the same sum payable at some time in the future. The preference of lender for money to use now over money promised in the future causes him to require some premium*'. These basic theories were varied in later years with various theories including liquidity preference etc.. For a more detailed reading and analysis, the reader may peruse Chapter 2, 'Interest in Arbitration', Matthew Secomb.

10 Para 12, Vedanta Ltd. v. Shenzen Shangdong Nuclear Power Construction Co. Ltd.; [2018 SCC OnLine SC 1922] (hereinafter 'Vedanta Ltd.')

11 *31(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money,*

explanation to s.37 of the ACA refers to s.2(b)[12] of the Interest Act, 1978 ('Interest Act'). Therefore, the Interest Act applies to arbitration to this limited extent of post-award default rate of interest. As regards s.34 of the Code of Civil Procedure, 1908 ('CPC'), it is now well settled that the same has no application to arbitration proceedings[13]. Recently, the Delhi High Court[14], albeit in the context of the unamended ACA, held that the Usurious Loans Act, 1918 would have no application to arbitration proceedings.

S.31(7) in its present form is slightly different from the unamended 1996 Act[15]. The amendment is limited to s.31(7)(b), whereby the default post-award Interest of 18% has been amended to '*current rate of interest*'. The said amendment was carried out with effect from 23.10.2015, pursuant to the recommendation of the 246th Law Commission Report[16] ('LCR') in order to '*move away from the existing rate of 18% to a market based*

the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of the award, from the date of award to the date of payment. Explanation- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978)

12 *S.2(b) of the Interest Act, 1978 – ["current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949). Explanation. —In this clause, "scheduled bank" means a bank, not being a co-operative bank, transacting any business authorised by the Banking Regulation Act, 1949 (10 of 1949);]*

13 Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd., [(2005) 6 SCC 462]

14 Turner Morrison Ltd. vs Rani Parvati Devi, O.M.P. (COMM) 50/2018, decided on 14 May, 2020

15 *[31 (7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.*]

16 "*INTERNEST ON SUMS AWARDED*
65.The issue on whether future interest is payable not only on the principal sum but also on the interest accrued till the date of the award remains controversial notwithstanding the clear wording of section 31(7). Initially, the position under the 1940 Act was that there was an express bar on awarding compound interest. This was evident in reading section 3(3)(c) of the Interest Act, 1978, section 29 of the Arbitration Act, 1940 and section 34 of the CPC, 1908.
66.However, the Supreme Court in Renusagar Power Co Ltd v. General Electric, 1994 Supp (1) SCC 644, held that awarding compound interest was not a violation of public policy of India. It is pertinent to note that these observations were made in the context of a case where the arbitral tribunal had expressly pointed out that they were not concerned with a contract to pay compound interest but were awarding compound interest as a remedy for a breach of contract in order to put the injured party in the same economic position it would have been in if the contract had been duly performed. This award was held to be in consonance with the public policy of India. Furthermore, as set out above, it was explicitly stated that compound interest can be awarded when it is permissible to do so under the statute.
67.Under the 1996 Act, the words that have been used are of far wider import and the scheme of the relevant provisions indicates that award of interest on interest is not only permitted but also the norm. Yet, a two judge bench of the Supreme Court, in State of Haryana v. S. L. Arora & Co., (2010) 3 SCC 690, held as follows "section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest 34 which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest." Apart from being contrary to the statutory scheme of the Act, the decision in Arora is also against the decision of (co-ordinate) two judge benches of the Supreme Court in ONGC v. M.C. Clelland Engineers S.A, (1999) (4) SCC 327 and UP Cooperative Federation Ltd v. Three Circles, (2009) 10 SCC 374.
68.Recognising this conflict of judicial opinion, the Supreme Court, in Hyder Consulting (U.K.) v. Governor of Orissa, (2013) 2 SCC 719 has referred this issue for determination to a three judge bench.
69.It is in this context that the Commission has recommended amendments to section 31 to clarify the scope of powers of the arbitral tribunal to award compound interest, as well as to rationalize the rate at which default interest ought

determination in line with commercial realities' as regards the default interest[17].

S.31(7) is in two parts: sub-section (a) pertains to the award of interest for the pre-reference and pendente-lite period ('pre-award') and sub-section (b) pertains to the post-award period.

Under s.31(7)(a) parties have primacy to decide the quantum of interest for the pre-award period in view of the words - '*Unless otherwise agreed by the parties*'. Where parties have agreed to a particular quantum of interest for the pre-award period the same ought to be granted by the arbitrator[18]. In the event the parties have not agreed on a rate of interest for the pre-award period, the arbitrator has the power to decide the same. Where the parties contractually agree that no interest shall be granted during the pre-reference period, the arbitrator has no power to grant interest[19]. However, where the contract is silent on interest, the arbitrator is at liberty to decide '*such rate as it deems reasonable*' and '*either on the whole, or any part of the sum awarded*'[20]. The words '*sum for which the award is made*'[21] means '*a particular amount of money*'[22] and may include both the 'principal' and 'interest'[23]. Therefore, when interest is awarded on the principal sum or damages, for the stage and purposes of s.31(7)(a), *the two components*' i.e. principal sum/ damages and interest, lose their '*separate identities*[24] and merge.

S.31(7)(b), on the other hand, *pertains to the post-award period i.e. from the date of the award to the date of realization*'[25]. As opposed to s.31(7)(a), the parties have no power to contractually agree to interest post-award, since the phrase '*unless otherwise agreed by*

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to be awarded and move away from the existing rate of 18% to a market based determination in line with commercial realities."

17 *Ibid,* para 69

18 Morgan Securities & Credits v. Videocon Industries Ltd., FAO(OS)(COMM) 9/2020, decided on 26.02.2020. The Division Bench of the Delhi High Court upheld the grant of 21% interest on the bill discounting facility during the pre-reference period as per the agreement/conduct of the parties and interest of 36% as contractually agreed between the parties for the period post demand notice.

19 Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited; [(2018) 9 SCC 266]. [It is however important to mention that the judgement of Reliance Cellulose is in the context of the Arbitration Act, 1940. The Court held that the arbitrator is constricted only by an express bar to the award of pre-reference and/or pendente lite interest. However, the court in Reliance Cellulose observed that the courts must follow the test of strict construction of clauses that bar payment of interest. Unless the clause in question does not provide a clear and express bar of payment of interest to be awarded by an arbitrator interest should not be held be barred. Clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest should not be permitted to stand in the way of an arbitrator awarding pre-reference or pendente lite interest. The Court further added - '*We hasten to add that the position as has been explained in some of the judgments above under Section 31(7)of the 1996 Act, is wholly different, inasmuch as Section 31(7 of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered*'. Also see Jaiprakash Associates Ltd. v. Tehri Hydro Development Corporation India Ltd., (THDC) 2019 SCC OnLine SC 143 and Sayeed Ahmed and Company v. State of Uttar Pradesh, (2009) 12 SCC 26].

20 Section 31(7)(a) of the ACA

21 *Ibid.*

22 Hyder Consulting (UK) Ltd. v. Governor, State of Orissa; [(2015) 2 SCC 189] (hereinafter 'Hyder Consulting'), para 4

23 *Ibid.,* para 7

24 *Ibid.,* para 13

25 Vedanta Ltd. (supra), Para 11

the parties' is absent in 31(7)(b)[26]. The word 'sum' in s.31(7)(b) is inclusive of interest *pendente lite*[27]. Once the 'sum' (which could include interest on principal) has been awarded under s.31(7)(a), the arbitrator may direct interest to be paid on such 'sum' for the post-award period under s.31(7)(b)[28]. However, the grant of interest under s. 31(7)(b) is mandatory. S.31(7)(b) clearly mandates that, in the event the Arbitrator does not give any specific directions as regards the rate of interest on the amount awarded, such amount 'shall' carry interest @ 18% p.a. from the date of award till the date of payment.

In the event the arbitrator fails to grant interest for the post-award period, the award shall carry default interest at the rate of two percent higher than the '*current rate of interest*'[29] prevalent on the date of the award, from the date of award to the date of payment.

S.31(7)(b) provides for default interest to be '*two percent higher than the current rate of interest prevalent on the date of the award*'. '*Current rate of interest*' has been defined as the '*highest of the maximum rates at which interest may be paid on different classes of deposits …… by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949)'*[30]. 'Scheduled bank' has been defined in the Explanation to mean *'a bank, not being a co-operative bank, transacting any business authorised by the Banking Regulation Act, 1949*[31]*'.*

Limitations under s.31(7)

First, let us examine if there are any fetters on the parties to agree to a quantum under s.31(7)(a). From a bare perusal of the language of s.31(7)(a), there appear to be none. However, a closer examination of s.74[32] of the Indian Contract Act, 1872 ('Contract

26 *Ibid,* Para 11,

27 Hyder Consulting (supra), Para 10

28 *Ibid.,* para 13

29 Explanation to s.31(7)(b) of ACA

30 S.29, Interest Act, 1978

31 Explanation to s.29, Interest Act, 1978

32 s.*74. Compensation for breach of contract where penalty stipulated for.—1 [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.] Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 2 [Central Government] or of any 3 [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein. Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested. Illustrations (a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable. (b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000, as the Court considers reasonable. (c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty. 4 [(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable. (e) A, who owes money to B a money-lender,*

Act') may have the effect of imposing some limits on parties from agreeing to any rate of interest under s.37(1)(a). The rate of interest cannot be in the nature of penalty[33]. If interest takes the form of a penalty, it will fall within the mischief of s.74 of the Contract Act. The language of s.74 is wide enough to include interest within the wording '*any other stipulation by way of penalty*'. If and when interest takes the form of penalty, it shall fall outside the purview of s.31(7) of the ACA and shall be subject to s.74 of the Contract Act. In essence, interest takes the form of liquidated damages.

At this stage, it would be important to mention that there is a distinction in law between interest awarded on damages and interest awarded as damages[34]. When interest (awarded on damages/principal sum) in arbitrations is agreed between the parties the same is covered by s.31(7)(a). There is no requirement under law to prove the loss suffered for the award of this interest by the claimant. However, if such agreed interest takes the form of a *stipulation by way of a penalty,* the same will fall outside the purview of interest under s.31(7)(a) and within the mischief of liquidated damages under s.74 of the Contract Act. In case of the latter, the said interest (sought to be treated as damages) shall be subject to conditions applicable to liquidated damages, including it being incumbent on the claimant to prove the loss suffered, and the quantum of interest mentioned in the contract being treated as a capped amount[35]. However, importantly, interest can be awarded on interest which is awarded as damages, as well.

There is no clear-cut guideline as to when interest is merely treated as interest and when it is treated as damages. There are some guiding examples though. It has been held that an arbitrator may award interest by way of damages for retention of money[36]. Claims arising out of additional work, breach of the terms of the agreement can be compensated by grant of interest[37]. Award of interest from its date but for an earlier period and future interest till realization of decree did not amount to grant of damages on damages[38]. Where interest is awarded by way of damages, interest thereon can also be awarded. "*Award of interest by way of compensation makes it the award of principal amount. Interest could naturally be awarded on such amount.*"[39]. It would, in this context, also be appropriate to make a mention of the Explanation to s.74 which states '*A stipulation of increased interest from*

undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach. 1. Subs. by Act 6 of 1899, s. 4, for the first paragraph of s. 74. 2. Subs. by the A.O. 1937, for "Government of India". 3. Subs. by the A.O. 1950, for "Provincial Government". 4. Added by Act 6 of 1899, s. 4. 32 (f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms. (g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

33 paragraph titled 'Rate of Interest', page 1182, the Indian Contract & Specific Relief Act Vol 2, Pollock & Mulla, 15th Edition.

34 Emphasis supplied by the Author

35 For conditions on liquidated damages, the reader may refer to Kailash Nath Associates v. Delhi Development Authority; [(2015) 4 SCC 136]

36 State of Orissa v. Gokulchandra Kanungo AIR; [1981 SCC OnLine Ori 42]

37 Union of India v. Pradeep Vinod Construction; [2005 SCC OnLine Del 1279]

38 Union of India v. S.B. Patel; [1999 SCC OnLine AP 254]

39 Delhi Development Authority v. Saraswati Construction Co.; [2004 SCC OnLine Del 836]

the date of default may be a stipulation by way of penalty'.

Recently, in the *Vedanta Ltd. matter,* the Supreme Court read the award of interest at 9% on the Euro component of the award to be consequential damages/compensation[40]. In the peculiar facts and circumstances, the Court modified the 9% interest on the Euro component as being violative of a clause in the contract between the parties[41] which prohibited the award of consequential damages. To fully appreciate the issue, it may be relevant to review the facts of the *Vedanta Ltd. matter* briefly - Disputes arose between one Vedanta Limited ('Vedanta') and Shenzhen Shandong Nuclear Power Construction Ltd. ('Shenzhen') *inter-alia* in relation to four contracts entered into between the parties on 22.05.2008, primarily relating to offshore engineering and technical services. The four contracts contained an identically worded arbitration clause. The termination clause in the agreement provided that in the event of termination, the purchaser (Vedanta) would be liable to pay 105% of the cost incurred by the supplier (Shenzhen) as compensation and no consequential damages would be payable[42]. The contract also did not provide for payment of interest. The agreed seat / place of arbitration was New Delhi, India. The governing law of the contract was the law of India, and jurisdiction of Indian Courts was exclusive. In view of the fact that the respondent Shenzhen was a company incorporated in China, the same was an international commercial arbitration, albeit governed by Part 1 of the 1996 Act. Shenzhen filed a claim with the arbitral tribunal seeking an award which had an INR, USD and EUR component along with *pendente lite* and future interest at the rate of 18% per annum until payment along with cost of arbitration. Vedanta refuted the allegations of Shenzhen and made a counter-claim seeking an award in its favour for an INR amount along with *pendente lite* and future interest at the rate of 18% per annum until the date of payment. The Arbitral Tribunal awarded, to Shenzhen, INR and EURO component (not USD) along-with interest at the rate of 9% from the date of institution of the arbitration proceedings provided the amount is paid/deposited within 120 days of the award. The Tribunal further provided that in the event Vedanta failed to pay the aforesaid amount within 120 days from the date of the Award, then Shenzhen would be entitled to further interest at the rate of 15% till the date of realization of the amount. The Tribunal also awarded cost of Rs. 50,00,000/- to Shenzhen. Vedanta challenged the Award by filing a s.34 ACA application, primarily challenging the Award on two grounds – the 105% cost (issue we are not concerned with for purposes of this article) and rate of interest awarded in favour of Shenzhen, especially with respect to the Euro component. The Single Judge found no infirmity with the Award. As regards interest, the Single Judge held, '*As far as the grant of interest on the amounts awarded to be paid in "Euro" is concerned, the Arbitral Tribunal has held that the amount so awarded would be valued at the exchange rate as prevalent on the date of filing of the claim petition and it would be the rate of interest payable thereon that would protect the respondent's interest due to the exchange rate fluctuations. The Arbitral Tribunal has, therefore, arrived at a balance between the two competing interest and cannot be faulted only on one part, while*

40 Vedanta Ltd. (supra), paras 19 and 21

41 Clause 35.2.3 of the General Conditions of the Contract between Vedanta and Shenzhen; Vedanta Ltd. (supra), para 19

42 Emphasis supplied by Author

trying to take benefit of the other'. Aggrieved, Vedanta filed a s.37 application, which too was dismissed, leading Vedanta to the Supreme Court. On the issue of the grant of the 9% interest on the Euro component, the Apex Court was of the view that the same, being excessive, amounted to '*compensation*'[43]. Consequential damages having been specifically barred by the contract, the said interest awarded as compensation, would be in the teeth of the contract[44]. It appears that the Court considered a monetary amount to be the basis or the standard for reading interest as[45] damages. The Court read the 9% interest on the Euro component as interest as[46] damages, and modified the same with a LIBOR plus 3% rate. interestingly, the Court appears to have read the 9% interest on the INR amount as interest on damages, which the Court left as is[47].

In this context, it would be important to consider if excessive interest is being considered as damages, this argument ought to have been raised by Vedanta in its pleadings before the arbitral tribunal. In the interest of disclosure, at the time of writing this article, the pleadings were not had sight of, but there is nothing in the judgements of either the Single Judge or the Division Bench that suggests that such an argument had been led by Vedanta. Assuming and if indeed Vedanta failed to plead that interest on the Euro component amounted to interest as damages as opposed to interest on damages during the arbitration, Shenzhen would have been deprived of the opportunity to prove these damages in terms of the scheme of s.73 and s.74 of the Contract Act. As a general principle, where interest is awarded '*as and by way of compensation/damages*', '*it must be shown that there is a relationship between the amount awarded and the default/unjustifiable delay/ harassment*[48]*.*

Now, coming to the issue on whether there are any limitations on the power of the arbitral tribunal under either s. 31(7) (a) or (b) - it appears from a plain reading of s.31(7), under sub-section (a), that the tribunal is required to exercise discretion as '*it deems reasonable*'. As regards sub-section (b), the power appears to be completely unfettered. The default rate of interest is prescribed as the '*current rate of interest*'. It appears that the arbitrator has the power to grant interest below or above the same.

However, judicial pronouncements have, over time, imposed certain limitations. The arbitrator has a duty to act fairly[49]. The arbitrator is also required to give reasons[50]. The Supreme Court has required that '*the discretion of the arbitrator to award interest must be exercised reasonably*[51]. In this regard it is pertinent to mention that a bare perusal of the

43 Vedanta Ltd. (supra), para 21

44 Vedanta Ltd. (supra), para 19

45 *Ibid.*

46 *Ibid.*

47 Vedanta Ltd. (*supra*), para 22

48 Ghaziabad Development Authority v. Balbir Singh – para 6 & 8; [(2004) 5 SCC 65]

49 Van der Giessen-De-Noord Shipbuilding Division BV v. Imtech Marine & Offshore B.V. [(2008) EWHC 2904] – held that awarding a rate higher than that claimed by the Claimant in the pleading would be against the duty of fairness by the arbitrator

50 Vedanta Ltd. (*supra*), para 17; Steel Authority of India v. Primetals Technologies India Pvt. Ltd., [O.M.P. (COMM)-349/2020 decided on 12.03.2020 (DHC), para 24]

51 Vedanta Ltd. (*supra*), para 12

language of s.31(7)(a) does not reveal any such interpretation. Per contra, the language is lucid in the grant of discretion to the arbitral tribunal to decide interest as '*it deems reasonable*'. The latter interpretation would also be in line with the scheme of the ACA, where appreciation of evidence lies within the domain of the arbitrator. In this context, the arbitrator would be the sole judge of reasonableness of interest in the peculiar facts and circumstances of a case. In fact the Division Bench of the Delhi High Court has recently held that quantum of interest awarded was not a question of law that can be decided in s.37 appeal[52]. This would be even more apropos in cases of international commercial arbitration, where the test of 'patent illegality' is not available.

However, the Supreme Court has also recently laid down guidelines for arbitral tribunals while making an award on interest- to '*take into consideration a host of factors' such as: (i) the 'loss of use' of the principal sum; (ii) the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation (viii) proportionality of the count awarded as Interest to the principal sums awarded."*[53]

The Supreme Court has also required the award of interest not to be '*excessive*', or '*contrary to the principle of proportionality and reasonableness*'. The Court held that where the interest component of the award is '*almost 50% of the sum awarded*' the same is excessive[54]. It is respectfully submitted that this observation is based on principles of usury and will have the effect of nullifying the principle of compound interest, which is specifically recognised under Indian law.

Power of the Supreme Court under Article 142

There can be no doubt that the power to modify the award exists with the Supreme Court under Article 142, to do '*complete justice between the Parties*'[55]. In the past, lower courts too have been modifying awards *qua* interest[56]. In my respectful submission, the power of modification of an award is not available to the courts (except the Supreme Court) under the ACA. But the Supreme Court appears to have granted such sanction to courts *qua* interest. The Supreme Court has stated, '*Courts may reduce the Interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic*

52 Morgan Securities & Credits v. Videocon Industries Ltd. (Supra)

53 Vedanta Ltd. (supra), para 12; reaffirmed in Steel Authority of India v. Primetals Technologies India Pvt. Ltd., [O.M.P. (COMM)-349/2020 decided on 12.03.2020 (DHC)]

54 Vedanta Ltd. (supra), Para 18

55 Ssangyong Engineering and Construction Co. Ltd. v. National Highway Authority of India, [2019 SCC OnLine SC 677]; para 156, McDermott International Inc. v. Burn Standard Co. Ltd., [(2006) 11 SCC 181]

56 Delhi Development Authority v. Anand and Associates (2008) Arb LR 490, 498 (rates of interest prevailing during the period for which the same is awarded must be kept in mind); Hindustan Construction v. DDA (2009) 2 Arb LR 321, 324 (Del – DB) (prevailing rates of inflation to be kept in mind); Sayeed Ahmed & Co. v. State of Uttar Pradesh (2009) 3 Arb LR 29, 37 (*'Unless the award of interest is found to be unwarranted for reasons to be recorded, the Court should not alter the rate of interest awarded by the arbitrator*'); Hydel Constructions Ltd. v. HPSEB (1999) 2 RAJ 483 (DB) (Court reduced 18% interest to 12% in view of fluctuation in bank rates relating to commercial transactions)

conditions or where it is nor found reasonable or promotes the interest of justice'[57]. In my respectful submission, the Supreme Court may need to reconsider this observation, as no power of modification is granted by the ACA to the Courts.

Interest Award in International Commercial Arbitration

An international commercial arbitration where India is the seat of arbitration[58]/[59] or where the *lex arbitri* (i.e. Arbitration and Conciliation Act, 1996)[60] is applicable, the award of interest shall be governed by the s.31(7) of the ACA. The Court in Vedanta Ltd. modified the 9% interest award on the EURO component to LIBOR + 3% from the date of the award till realization. It is most respectfully submitted that in view of the default provision, if the impugned award required modification, the Court ought to have applied the '*current rate of interest*' as per the mandate of s.31(7)(b). It is unclear how the leap to LIBOR[61] + 3% interest was made.

Dual Rate of Interest

In the Vedanta Ltd. matter, the arbitrator had '*adopted a dual rate of interest*' whereby the award-debtor was directed to pay 9% interest up to 120 days post-award. In the event of non-compliance, the rate of interest would be 15% on the sum awarded. The Court found this dual rate interest to be '*unjustified*' and the 120 days to be '*arbitrary*'[62]. The Court held that the award of 15% post 120 days was '*exorbitant from an economic standpoint*' and '*ha(d) no correlation with prevailing contemporary international rates of interest*'[63] and interfered with the right of the award-debtor to challenge the award within a maximum period of 120 days as provided by s.34(3) of the ACA[64]. Strictly speaking, the award of interest does not require a correlation to prevailing contemporary international rates of interest. The 246th LCR recommended the addition of the explanation to s. 31(7) in order to '*move away from the existing rate of 18% to a market based determination in line with commercial realities*' as regards the default interest. Rate of interest should be according to the current market rate[65]. The Reserve Bank of India would typically also prescribe

57 Vedanta Ltd. (*supra*), para 12

58 Vedanta Ltd. (*supra*), para 6. It is important to mention that the Court also held in para 7, *'The rate of interest awarded must correspond to the currency in which the award is given, and must be in conformity with the laws in force in the lex fori.'*

59 '*In some jurisdictions, for example Bermuda, Hong Kong, England, and Scotland, the power to award interest is governed by the law of the place of arbitration. In others, for example under German conflict-of-laws rules, the liability to pay interest is a question of substantive law and thus governed by the law of the contract*' –Redfern and Hunter on International Arbitration, Sixth Edition, para 9.73

60 Vedanta Ltd. (*supra*), para 8

61 Also see Steel Authority of India v. Seaspray Shipping Co. Ltd., 2019 SCC OnLine Del 7415

62 Vedanta Ltd. (*supra*), para 16

63 Vedanta Ltd. (*supra*), para 17

64 S.34(3) of 1996 Act- *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*

65 Palmyra Tsiris Lines S.A. of Piraeus C/o Transport Counsellors International Ltd. v. Union of India, [1998 SCC OnLine Del 177]

rates for foreign currency accounts. Furthermore, post-award interest is to ensure speedy payment in compliance with the award[66]. '*In general, it is open to arbitrators to set the rate of the post-award interest in any amount that they deem appropriate*'[67]. The party seeking the grant of interest is not under any obligation to prove that the Contract was a commercial contract, or what the prevailing rate of interest was during the period for which interest is sought.[68]

Conclusion

An unfortunate fall-out of the 2018 Vedanta Ltd. judgement is, that it does appear that challenges of awards on ground of interest are likely to enhance[69]. That said, from a perusal of the law and various judgements, the law on interest as it stands today is:

(i) As regard pre-award interest, the parties are free to decide on interest on the principal sum/damages. They should, however, be careful to ensure that such contractual interest does not fall in the category of a penalty in terms of s.74 of the Contract Act;

(ii) Where interest is claimed as damages, the claimant would need to meet the burden of proof for the criteria of damages;

(iii) Where no interest is agreed between the parties in the pre-award period, the arbitrator can decide on the interest, subject to following the guidelines prescribed by the judgement in Vedanta Ltd.;

(iv) The interest awarded in the pre-award period shall form part of the 'sum' for purposes of the post-award period;

(v) For the post-award period, the arbitrator shall be at liberty to award interest on the 'sum' subject to the guidelines framed by the Supreme Court;

(vi) In the event of failure by the arbitrator to award interest for the post-award period, the award shall carry default interest at two percent higher than the '*current rate of interest*.[70]

66 Hyder Consulting (*supra*), para 26

67 Redfern and Hunter on International Arbitration, Sixth Edition, para 9.83

68 Maneesh Pharmaceutical Ltd. v. Contract Advertising India Pvt. Ltd.; [2013 (2) Arb LR 68]

69 See Morgan Securities & Credits v. Videocon Industries Ltd. (Supra) & Steel Authority of India v. Primetals Technologies India Pvt. Ltd., [O.M.P. (COMM)-349/2020 decided on 12.03.2020 (DHC)]

70 Section 2(b) of the Interest Act, 1978.

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He has had the unique privilege of working with three of the world's leading arbitration institutions, London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC) and Singapore Chamber of Maritime Arbitration (SCMA), and has over eighteen years of experience as arbitration administrator, arbitrator, advocate, and law teacher.

Mr. Thomas was a member of the expert committee constituted by the Law Commission of India to assist in the preparation of its 246th Report on 'Amendments to the Arbitration and Conciliation Act, 1996'.

He is on the International Editorial Board of the Brazilian Journal of Alternative Dispute Resolution (RBADR). Mr. Thomas is also a guest faculty at the Indian Society of International Law (ISIL), the Arun Jaitley National Institute of Financial Management and a few other law schools, where he teaches arbitration. Until recently, he also served a year long tenure as the Director of the Faculty of Law at Manav Rachna University.

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India as A Hub for International Arbitration: Is it An Idea whose time has come?

-Mr. Ajay Thomas

RIP Van Winkle Wakes Up

The past few decades have seen a gradual but perceivable shift in the choice of dispute resolution methods, especially for commercial disputes. Arbitration is now increasingly being looked upon as a viable alternative to litigating in a Court of law. This has had the effect of awakening the stakeholders and guardians of the process in India to the tremendous potential that arbitration offers, not only as a plausible solution to resolving the judicial backlog conundrum, but also in providing a mechanism for facilitating the ease of doing business in the country.

The Judiciary has been a vanguard in this process by its actions, resulting in the establishment of court-annexed arbitration and ADR centres, and also manifested by its generically pro-arbitration decisions.

The Government too has recognised the importance which an effective arbitration mechanism can play in attracting foreign direct investment into the country. This has resulted in the Government according 'national priority' to the creation of an enabling alternate dispute resolution ecosystem, done with a view to seeing fruition of its stated vision to establish and promote India globally as an arbitration hub[1]. Evidence of this prioritisation can be seen

1 Narendra Modi, Valedictory speech at an international conference *National Initiative towards Strengthening Arbitration and Enforcement in India*, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=151887(last accessed on 10 July 2020).

in the 2015[2] and 2019[3] amendments to the Arbitration and Conciliation Act, 1996 the Departments of Justice's 'Action Plan to Reduce Government Litigation',[4] and other policy decisions taken to plant the seeds of reform.

In light of these developments, it could be argued that the time is ripe for an objective consideration and analysis of whether India has indeed the potential to be an arbitration hub.

Right Time?

Let me start off with a bit of historical perspective. There was a time, about twenty years ago, when India was considered a virtual outcasteby many in the international arbitration community, especially for its arbitration unfriendly court decisions. The first blow came in 2002 with *Bhatia International v. Bulk Trading SA*[5]; disaster followed with *ONGC v. Saw Pipes* (2003)[6]; then came *SBP v. Patel Engineering* (2005)[7] and,the last nail in the coffin, *Venture Global Engineering v. Satyam Computer Services* (2008).[8] All of these decisions were subject to universal criticism for being against the spirit of arbitration. These were the 'bad old days' of Indian arbitration!

From here if one were to fast forward to today, the question that begs to be answered is this: has there been such a sea change that from being seen as an arbitration unfriendly jurisdiction, India today is aspiring to be a hub for arbitration? Has the country really moved on from those days when arbitration was described as 'making lawyers laugh and legal philosophers weep'?[9]It is indisputable that ground realities have changed for the better, but have the changes been so transformative that India can now realistically aspire to be an arbitration hub?

If one were to go by statistics from leading international arbitral institutions and trends reported by recent surveys,[10] it is but certain that the tide of arbitration and especially institutional arbitration is rising. And, safe in the age old wisdom that a rising tide lifts all boats,[11]it is perhaps as good a time as ever for India to launch a strong arbitration ship and benefit from this rising tide, which has been characterized by a leading jurist as the 'golden age of arbitration'.[12]

2 Arbitration and Conciliation (Amendment) Act, 2015.

3 Arbitration and Conciliation (Amendment) Act, 2019.

4 Available at http://doj.gov.in/page/action-plan-reduce-government-litigation (last accessed on 10 July 2019)

5 (2002)4 SCC 105

6 (2003) 5 SCC 705

7 (2005) 8 SCC 618

8 (2008) 4 SCC 190

9 Justice DA Desai in *Guru Nanak Foundation v. Rattan Singh & Sons*(1981) 4 SCC 634.

10 Generally see, Paul Friedland and Stavros Brekoulakis,*2018 International Arbitration Survey: The Evolution of International Arbitration*, White & Case and Queen Mary University of London.

11 With the exception, perhaps, of boats with holes in their hulls!

12 Sundaresh Menon, 'Keynote Address' at the ICCA 2012Congress in Singapore. Mr Menon was then Attorney General of Singapore and is currently the Chief Justice of the Supreme Court of Singapore.

Arbitration Hub: The Basic Ingredients

The fundamental ingredients that make for a jurisdiction to be an arbitration hub could be listed as follows:

a) Proactive government

A government which is knowledgeable, perceptive and supportive of arbitration. We must remember that the Singapore success story in arbitration was entirely conceptualised and driven by the government. I recall from my years spent working at the Singapore International Arbitration Centre (SIAC), that the government was so focussed on promoting Singapore as an arbitration destination that there was a reference to arbitration in almost every speech made by a minister or senior bureaucrat, notwithstanding that the occasion was not even remotely related to the law.

b) Independent and supportive judiciary

Arbitration is not a freestanding system of justice. It is a system established and regulated pursuant to law. Therefore, notwithstanding arbitration's roots in party autonomy, it is somewhat paradoxical that national courts remain the 'final guarantors of the legal fitness of arbitral processes and awards'.[13] A judiciary that follows a pro-arbitration, minimal interference policy is a given. After all, an arbitration law no matter how well drafted, is only as good as the court interpreting and enforcing that law.

c) Modern arbitration legislative framework

A well drafted, modern, user-friendly legislation that is aligned with international best-practice and revised periodically to provide explicit legislative support to contemporary innovations and techniques in arbitration.[14] The Singaporean International Arbitration Act (IAA) which governs the conduct of international arbitrations seated in Singapore was originally enacted in 1994. Since then it has seen nine amendments, including two revised editions in 1995 and 2002, all done with a view to ensuring that the legislation remains responsive to the evolving needs of end-users and the legal profession.

d) Institutional Support

An efficient, strong, unifying, flagship national institution. It is not a mere coincidence that all leading international arbitral institutions are home-ported in major arbitration hubs: ICC-Paris, SIAC-Singapore, LCIA-London, AAA-New York, HKIAC-Hong Kong.

13 Chief Justice Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution', Opening Lecture for the DIFC Courts, Lecture Series 2015. Available at https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf (last accessed on 12 July 2020).

14 For example, Hong Kong and Singapore recently amended legislation to allow third party funding in relation to international commercial arbitration.

e) Geographical location and world-class infrastructure

Convenient geographical location,[15] excellent air connectivity, modern infrastructure, and state-of-the-art hearing centres with supporting services like real-time transcribing and translation services.

f) Cosmopolitan Legal Fraternity

Every jurisdiction wanting to project itself as an arbitration hub would have to allow freedom of choice of counsel and arbitrators. Certain jurisdictions have tended to rely heavily on foreign talent to quickly build their reputations. However, this approach has its pitfalls. The true test of an arbitration hub would be to have its own core of experienced arbitration practitioners.

g) Lawyers

It would also be extremely helpful to have a cadre of specialist arbitration lawyers who would provide for an excellent pool of locally based potential arbitrators. Support from the national bar council and bar associations would also be crucial. Hong Kong is a classic example of a jurisdiction where the local bar played a stellar role in the promotion and development of that jurisdiction as a hub.

As India looks at positioning itself as an arbitration hub it would be extremely important to take a deep look at its own competitive advantages. And then, in light of the recent pro-arbitration initiatives by the government and the judiciary, analyse and see where it stands vis-à-vis the fundamental ingredients necessary to establish an arbitration hub.

India's Strengths

a) Strong and growing economy

The past few decades has been witness to the steady transformation of the Indian economy from a large plodding elephant into a sprightly tiger. India is the world's sixth largest economy by nominal GDP and the third largest by purchasing power parity (PPP).The 2019 Global Economic Prospect (GEP) report released by the World Bank projects India's GDP growth to pick up to 7.5% in 2019-20and to stay at this pace through the next two fiscal years[16].The Indian middle class is almost 250 million strong, which will continue to drive India's consumer spending and fuel its robust economic growth.

Given the decades of transformative growth, international perceptions towards India have changed over the years; a general disinterest giving way to quiet admiration and respect. As the economy grows, the demand for dispute resolution and legal services will also see a proportional rise. It is also undeniable that given the strength of the

15 Sydneyis an exception. Notwithstanding its geographically inconvenient location, it has been working towards establishing itself as an international arbitration hub.

16 World Bank, *Global Economic Prospects: Heightened Tensions, Subdued Investment*, June 2019, p.4

Indian economy, international investors will continue to be keen to do business in India.

Whilst some of them might prefer to arbitrate in neutral seats outside India, there will be others that will be happy to have their arbitrations in India. It was essentially this market that was sought to be tapped by the London Court of International Arbitration (LCIA) when it established its Indian subsidiary LCIA India in 2009.[17] It has often been remarked that LCIA India was the first example of 'Make in India' in the arbitration sector.

b) Modern Legislation

The legislative framework supporting arbitration in India essentially comprises the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law - considered by most to be the gold standard for arbitration statutes. Further, the law has undergone significant reform since 2015, injecting a great deal of discipline into the process without compromising on party autonomy. The Act now also empowers the Courts to grant interim orders in aid of international arbitration, regardless of whether the arbitration is seated in India or not. India is also a party to the New York Convention[18] which enables awards from India to be enforced in 164 countries around the world.

c) No anti-foreigner bias

It can be safely said that there is no anti-foreigner bias in the Indian public justice system. Fali Nariman in his brilliant speech at the first LCIA India Annual Lecture[19] remarked:

> The foreigner loses or wins as often as the local. In factthe statistics show that in the last 60 years, amongst the important (and reported) arbitration cases that ultimately reached the Supreme Court (both under the old law and the new law), foreign parties succeeded in 14 out of 22 cases. And as for Indian High Courts, if you browse through the ICCA Yearbooks (which also report High Court decisions), you will find that the tally is that out of 17 important cases decided by High Courts in India (cases which were not taken to the Supreme Court), foreign parties succeeded in more than half of them.[20]

17 The LCIA India secretariat was based in New Delhi and it was the LCIA's first independent subsidiary outside London. During the seven years of its operations in India, backed by the experience and expertise of the LCIA, it offered all theservices offered by the LCIA in London, but importantly at local rates and under rules that were tweaked to suit the law and practice of arbitration in India.

18 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

19 Delivered at the Taj Mahal Hotel, New Delhi, on 12 February 2011. Titled 'Ten Steps to Salvage Arbitration in India'. I have been quoting Fali Nariman shamelessly ever since.

20 *Arbitration International*, Volume 27 Issue 2 (2011) at pages 117-118. Quoting statistics compiled by Sumeet Kachwaha in his seminal article 'Enforcement of Arbitral Awards in India', *Asian International Arbitration Journal*, Volume 4 Number 1 (2008) at pages 64-82.

d) Rule of Law

The principle of rule of law has been has found a safe abode in the Indian constitution. Further, given India's strong democratic ethos and common law traditions, I cannot be faulted for saying that there is an understanding of, respect for, and application of the rule of law by a fiercely independent judiciary.

e) Legal Expertise

India has a legal profession of outstanding ability and reputation second to none. The standard of legal training offered in India is well-recognised by international law firms who over the past decade have been recruiting directly from leading Indian law schools. In a first, Dipen Sabharwal, a 2001 alumnus from a leading Indian law school was recently made Queen's Counsel (QC)[21]. A remarkable achievement!

In a welcome development, there has been a move to constitute a specialised arbitration bar comprising of lawyers whose practice is predominantly arbitration focussed[22].The widespread use of the English language and its common law traditions provides India with a vital link with the rest of the world.

f) Large and diverse Indian diaspora

There are common bonds of the people of a wide array of countries with India, from Suriname, Guyana, South Africa to Mauritius, Singapore, Malaysia and Fiji. This constituency, along with the ubiquitous and influential non-resident Indian (NRI) community, can and should be to be tapped to garner support in aid of India's arbitration ambitions.

Towards A Brighter Future

Though no fortune teller with a crystal ball is at hand to predict the future, certain recent initiatives of the two main sectoral players: the judiciary and the government, do hold out the promise of a brighter future. The critical role of the judiciary and government in promoting the development of arbitration has been beautifully described by a former Chief Justice of the DIFC Courts[23] as follows:

> If arbitration can be likened to a football game, then the court and the government of the seat are the main referees and organizers of that football game. There is no use having the best players, the best rules and the best gameplay, if the referee does not recognize any of the goals scored, or the organizers do not provide a proper infrastructure or level playing field.[24]

21 *See* http://www.qcappointments.org/.

22 Indian Arbitration Forum (IAF) is a first-of-its-kind initiative by leading arbitration practitioners to establish an arbitration bar in India. It recently launched a set of best practices guidelines for the conduct of arbitral proceedings.

23 Michael Hwang SC was the Chief Justice of the Dubai International Financial Centre (DIFC) Court from June 2010 until November 2018.

24 Fong Lee Cheng and Michael Hwang, 'Relevant Considerations in Choosing the Place of Arbitration', *Asian International Arbitration Journal* Volume 4 Issue 2 (2008) atpp.195-220.

a) The Judiciary

Historically, courts the world over have viewed arbitration with some suspicion tinged with a sprinkling of hostility. The judiciary has had to find that right balance between support and intervention. I must say, frankly and truthfully, that in the past there was some tension on this front in India. About a decade ago, I had written that so long as the attitude of the court towards arbitration remains an anxiety, a solution based purely on the amendment of the law is unlikely to work in India.[25]

But so much has changed in the past decade. There has been a very welcome course correction by the judiciary, and by and large (barring the odd aberration) the decisions emanating from the High Courts and Supreme Court have been very supportive of arbitration but (importantly) not blindly so. And I believe this is the correct approach.[26]

There has also been a realization that arbitration in conjunction with other forms of ADR can be a very useful tool in easing the pressure on the mainstream public justice system, burdened as it is with a huge backlog of c. 34 million cases. This pragmatism can be seen in the judiciary's recent approach and attitude to arbitration, which has been rational and enlightened.

It is also commendable that the judiciary has taken upon itself the lead to institutionalise arbitration in the country. This has resulted in the establishment of court-annexed arbitration centres in New Delhi, Bangalore, Chandigarh and Chennai. If one were to go purely by statistics, these centers, in particular the Delhi International Arbitration Centre (DIAC),[27]have achieved great success.

b) Government

In light of the government's resolve to create an enabling environment for arbitration to thrive, and its vision for India to be an arbitration hub, it would helpful to look at the recent initiatives of the government on this front.

i. Liberalization of the Legal Services Sector

Every jurisdiction wanting to project itself as an arbitration hub would have to allow freedom of counsel in arbitration. Consistent with the governments ongoing campaign to liberalize other sectors of the Indian economy, it has indicated its willingness to open up the legal services sector. In 2017, the Ministry of Commerce and Industry amended the Special Economic Zone

25 Ajay Thomas, 'Light at the End of the Tunnel', *The Asia-Pacific Arbitration Review 2010* at p.10.

26 For an international perspective, see Michael Hwang, 'Egregious Errors and Public Policy: Are the Singapore Courts Too Arbitration Friendly?'*Selected Essays on International Commercial Arbitration*'. Quoting a speech made by Singapore Justice of Appeal V K Rajah at the Singapore Academy of Law Conference 2011, Michael Hwang writes in the postscript to his article:
In his words, "A pro-arbitration approach does not mean a blind approach" and, while "[c]ourts will be slow to upset arbitration awards, … it would be wrong to say that courts will never or are reluctant [to do so]". The learned judge went on to say that, if the courts really felt that their intervention was necessary in the interests of justice, they would find a way of ensuring that justice would be done.

27 The DIAC has administered 2328 cases from its establishment in November 2009 until December 2018.

Rules,[28]revoking a ban on law and accountancy firms to advise clients from multi-services Special Economic Zones. Whilst international law firms and lawyers will surely add to the depth of the existing legal talent available in India, the floods gates should not be opened at one go. There must be a gradual and phased opening of the sector.

ii. Action Plan to Reduce Government Litigation

The Department of Justice in its action plan of June 2017 has suggested that all agreements between the government and private bodies should mandatorily include a reference to either arbitration or mediation.

iii. Legislative Stimulus

A clear and unambiguous amendment of the law is a plausible solution to undo past and forestall future aberrant decisions. In a speech delivered in 2011[29], the legendary Fali Nariman reminded us that:

> Salvaging arbitration in India is just not possible until at least three decisions of the Supreme Court are first put out of the way in our precedent…they are Bhatia International (2002), Saw Pipes (2003) and Venture Global (2008). These decisions have distorted the provisions of the 1996 act, the provisions as originally intended must be restored so that the Act is brought back to conformity with the letter and spirit of the Model law.

- Amendments to the Arbitration Act (2015)

The 2015 amendments along with the Supreme Court's decision in the *BALCO* case[30] not only did away with those three errant decisions, but ushered in a new era for Indian arbitration by introducing a whole of host of reformative provisions: time limits for the arbitral award; new disclosure norms inspired by the IBA Guidelines on Conflict of Interest; the unruly horse that is public policy has been reigned-in to a considerable extent;[31]a comprehensive costs regime has been introduced; and the ghost of the 'automatic stay' on enforcement[32] has been laid to rest.

I cannot but remark that had these amendments come just a few years earlier, perhaps, it would have forestalled the London Court of International Arbitration (LCIA) from taking its decision to shut down the operations of its Indian subsidiary in 2016.[33]

28 See Rule 76 of the Special Economic Zones Rules, 2006 framed under the Special Economic Zones Act, 2015. This Rules was amended by Notification GSR No.12E dated 3 January 2017.

29 *Supra* n.19 at p.125.

30 *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

31 This has been done by listing out circumstances that would constitute violation of public policy.

32 See section 19 of the amendment act.

33 As the founding Registrar and Director of LCIA India, the author was entrusted with the task of establishing, operationalising and running the institution from its New Delhi secretariat. Sadly, he also had to oversee the

- Amendments to the Arbitration Act (2019)

  In 2018 the government introduced another Amendment Bill[34] in Parliament. The Law Minister of India had described the Bill as 'a momentous and important legislation' aimed at making India 'a hub for international arbitration.'[35] However, concerns had been raised over certain provisions of this Bill. Some had compared it to the proverbial curate's egg – mostly good but bad in parts.

  Some of the salient features of this amendment bill were, it provided for appointment of arbitrators in adhoc arbitrations by institutions rather than by the Courts, which is line with practices in more popular arbitration jurisdictions. It sought to establish an independent body called the Arbitration Council of India (ACI) which would be tasked with, among other things, accrediting institutions and arbitrators; and maintaining an electronic depository of awards. The Bill introduced qualifications and immunity for arbitrators, and imposed a duty of confidentiality on arbitrators, institutions and parties. There were also clarificatory provisions relating to the prospective applicability of the 2015 amendments, intended to deal with uncertainty created by case law.

  The Bill was passed by the Lok Sabha[36] in August 2018 and was later introduced in the Rajya Sabha.[37] However, with the dissolution of the Sixteenth Lok Sabha, the Bill lapsed, and it was hoped that this would give the government an opportunity to have a relook at its more controversial provisions.

  In July 2019, the government introduced in the Rajya Sabha another Bill[38] to replace the one that had lapsed. This Bill breezed through both houses of Parliament, received Presidential assent and was notified in the Official Gazette, all in the space of twenty two days. However, it would be pertinent to note that the provisions of the Act of 2019 are essentially the same as the 2018 Bill, albeit with very minor changes.

- New Delhi International Arbitration Centre Act

  Another initiative worth mentioning is an Act[39] that seeks to establish an autonomous and independent institution called the New Delhi International Arbitration Centre (NDIAC), which will serve as the flagship

winding down operations!

34 Arbitration and Conciliation (Amendment) Bill, 2018.

35 'LS passes arbitration bill, govt says it's a 'momentous' legislation', *Business Standard*, available athttps://www.business-standard.com/article/pti-stories/ls-passes-arbitration-bill-118081000846_1.html (last accessed on 10 July 2020)

36 Lower House of Parliament.

37 Upper House of Parliament.

38 Arbitration and Conciliation (Amendment) Bill, 2019.

39 New Delhi International Arbitration Centre Act, 2019.

national arbitral institution for India. It is proposed that the NDIAC will be in housed in the premises of the International Centre for Alternative Dispute Resolution (ICADR) in South Delhi. This sprawling modern facility boasts of floor space in excess of 80,000 square feet.

A strong and efficient national arbitration institution can play a catalytic role in promoting the institutionalisation of arbitration in a country. The HKIAC and the SIAC are two shining examples of such national institutions. It is hoped that the NDIAC will play no less a role and through its services enhance the attractiveness of India as a seat and venue for arbitrations.

Defining Goals

India played a pioneering role in laying the foundation of arbitration as we know it today. It is only one of eight countries that has been a member of UNCITRAL right from its inception, and was amongst the ten original signatories to the New York Convention.[40] India has had the privilege of being the first Asian country to have played host to the prestigious biennial ICCA[41] Congress in 1975 and then again in 2010.

But for a variety of reasons, including a problematic arbitration legislation coupled with interminable judicial delays,[42] the past few decades have been witness to India's inability to lead by example and to capitalise on the benefits of its pioneering efforts in giving shape to the modern law and practice of arbitration. Therefore, I believe that the time has come for India to revisit its tryst with destiny and work systematically towards redeeming its rightful position in the world of arbitration.

However, given the state of the existing legal and physical infrastructure and the priorities of an emerging economy, it would be very important for India to realistically define its end goal before it launches its refurbished arbitration ship. A goal which has to be realistic, rather than merely rhetorical.

Where does India see itself in 2025 and then in 2030? Once this question has been answered, it would be imperative to move to a phased plan of action by formulating a 'National Arbitration Policy.'[43] This should be the document that acts as a rallying point and an *aide-mémoire*for all stake holders to come together and work in a unified and concerted manner to achieve the objective at hand.

40 India ratified the Convention in 1960, the United Kingdom in 1975 and Singapore only in 1986.

41 The International Council for Commercial Arbitration (ICCA) is a worldwide non-governmental organization accredited by the United Nations, devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of resolving international commercial disputes. See https://www.arbitration-icca.org/.

42 See Sumeet Kachwaha, 'India As A Global Destination For International Arbitration: What Will It Take To Reach There?' Available at: http://www.mondaq.com/india/x/616476/India+As+A+Global+Destination+For+International+Arbitration+What+Will+It+Take+To+Reach+There (last accessed on 11 July 2020).

43 It need not be something long winded. A basic document stating the goal, steps to be undertaken and specific timelines would be extremely useful.

A Word of Caution!

India can take comfort in the fact that it is not alone in its quest to be an arbitration hub. Over the past decade or so, the aspirational impulse of nations to be an arbitration hub has been compared to be a bit like their aspiration to have a national airline: somewhat universal.[44]Jurisdictions cutting across the economic, legal and political spectrum, from The Bahamas, Scotland, Nigeria, Rwanda, Mauritius, to Dubai, Saudi Arabia, Djibouti, Sydney, Kuala Lumpur and Seoul, have all declared their intention to be arbitration hubs.

It would be instructive to remember that arbitration is a buyer's market in terms of choice of seat and venue, and the race to become an arbitration hub is intense. From my past experience, having worked for almost a decade with the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA), I can confidently tell you that winning market share for a seat (or an institution) is never easy. It takes a lot of planning, consistent hard work, persistence, patience[45] and deep pockets.

Be that as it may, if one were to go by the annual reports of leading international arbitral institutions,[46] Indian parties have been substantially and consistently contributing to their dockets, and not surprisingly the large bulk of these arbitrations are seated outside India.

The legendary Jack Welch[47] used to often say, 'Control your destiny or someone else will'. Paraphrasing him, I believe that the time has indeed come for India to take control of its arbitration destiny. After all, with a government which appears to be serious about arbitration reform, the judiciary consciously making an attempt to be arbitration-friendly, and the tremendous enthusiasm amongst members of the bar and academia, I can definitely see the creation of an enabling environment for India to emerge as an arbitration hub.

Conclusion

It is unlikely that India will be become an arbitration hub overnight. To understand this reality, all one needs to look at is the recent example of Singapore. Having started it's arbitration promotion initiatives in the early 90's, the city state has achieved recognition as an international hub for arbitration only in the very recent past.

If the end goal is to be an international arbitration hub, the first step would be for India to improve its domestic arbitration scene, whilst concurrently positioning the country as an regional hub for South Asian disputes, or for disputes from a particular domain, such as information technology in which it has a competitive advantage. India has to find its niche. It cannot be just another hub. It simply will not work!

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44 Inspired by David Samuels, 'Introduction' in *Guide to Regional Arbitration-2018*, Global Arbitration Review.

45 There is often a long gestation period before a jurisdiction sees the fruits of its efforts.

46 See the SIAC's annual reports, available at https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report(last accessed on 12 July 2020).

47 Former Chairman of General Electric (GE).

It has been said that there is 'many a slip between a devout wish and its ultimate fulfilment'.[48] Having studied, lived and worked in Singapore for a few years, I have had the privilege of seeing first-hand how Singapore has managed to transform its legal sector to emerge as a global dispute resolution hub. It is therefore I believe, that it would require Herculean effort and resolute determination, backed by strong political will, to turn into a living reality, the hope and expectation of the Government that India itself may one day become an arbitration hub.

But I must hasten say that there is an air of expectancy wafting through arbitration circles in India; and with the reforms backed by solid political will, one cannot but be optimistic about the future of arbitration in India.

48 Nariman, *supra* n. 19 at p. 125.

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